

REPORTS
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PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

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Kevin Kelly
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PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning October 1, 2004 through August 31, 2005. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 1978, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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XM-2005-0105 & XM-2005-0124	ConnectAmerica, Inc. (Transfer of assets and subscribers to Network US, Inc. d/b/a CA Affinity, approved).....	3/29/05
TD-2005-0252	ConnectOne Communications Corporation d/b/a Long Distance Connect Communications Corporation (Certificate of service authority, IXC, canceled).....	2/22/05
WO-2005-0242	Consolidated Public Water Supply District No. 1 of Boone County and Ashland, City of (Water territorial agreement, order approving agreement).....	4/21/05

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TD-2005-0403	Convergent Communications Services, Inc. (Certificate of service authority, IXC and local exchange telecommunications services, canceled).....	6/9/05
XD-2005-0404	Corban Communications, Inc. (Certificate of service authority, IXC and non-switched local telecommunications service, canceled).....	5/11/05
XD-2005-0454	CoreComm Missouri, Inc. (Certificate of service authority, IXC, canceled).....	6/24/05
XD-2006-0016	CRG International, Inc., d/b/a Network One (Certificate of service authority, IXC, canceled).....	8/2/05
XD-2005-0472	Cybertel, Communications Corp. (Certificate of service authority, IXC, canceled)	6/21/05
TD-2005-0264	Cypress Communications Operating Company, Inc. (Certificate of service authority, basic local exchange telecommunications services, null and void, IXC, canceled)..	2/23/05
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XD-2006-0040	Dancris Telecom, LLC (Certificate of service authority, IXC, canceled).....	8/3/05
TD-2005-0167	Delta Phones, Inc. (Certificate of service authority, basic local exchange telecommunications service, canceled)	12/29/04
XA-2005-0176	DELTEL, Inc. (Certificate of service authority, IXC, granted).....	1/20/05
TD-2005-0162	Direct One, L.L.C. (Certificate of service authority, IXC, canceled).....	12/27/04
XD-2006-0037	Discount Network Services, Inc. (Certificate of service authority, IXC, canceled).....	8/2/05
PD-2005-0235	DR Communications, Inc., Lemax, Inc., and Phoenix Telecom, L.L.C. (Certificate of service authority, pay phones, canceled).....	2/1/05
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TD-2005-0253	Eagle Communications Group, Inc. (Certificate of service authority, IXC and pay phones, canceled)....	3/16/05
TD-2005-0172	Eastern Telecommunications, Inc. (Certificate of service authority, IXC, canceled).....	1/4/05
XD-2005-0489	ECI Communications, Inc., d/b/a ITS Network Services (Certificate of service authority, IXC, canceled).....	7/13/05
TC-2004-0340	Econo-Call, Inc., Public Service Commission Staff v.(Complaint case, certificate of service authority, IXC, canceled).....	10/5/04
XD-2005-0296	Econodial, LLC (Certificate of service authority, IXC, canceled).....	4/22/05
TD-2005-0210	El Paso Networks, L.L.C. (Certificate of service authority, IXC and local telecommunications services, canceled).....	1/26/05
WA-2004-0581 & SA-2004-0582	Emerald Pointe Utility Company (Certificate of public convenience and necessity to provide water and sewer service in Taney County, granted).....	12/2/04
WA-2005-0306 & SA-2005-0307	Emerald Pointe Utility Company (Certificate of public convenience and necessity to provide water and sewer service in a portion of Taney County, approved).....	5/5/05

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TD-2005-0167	EZ Talk Communications, LLC (Certificate of service authority, basic local telecommunications services, canceled).....	12/29/04
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TD-2005-0155	FairPoint Communications Solutions Corporation (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled)....	12/20/04
GR-2004-0466	Fidelity Natural Gas, Inc. (2003-2004 Actual Cost Adjustment, order adopting PSC Staff recommendations and requiring adjustment of ACA balance).....	5/17/05
PD-2005-0350	Flying J Inc. (Certificate of service authority, pay phones, canceled).....	4/5/05
TA-2005-0045	Focal Communications Corporation of Missouri (Transfer of assets and customers to Broadwing Communications, LLC, order approving transfer of assets and customers and granting basic local certificate of service authority).....	10/28/04
TA-2005-0045	Focal Communications Corporation of Missouri (Certificate of service authority, IXC and basic local exchange telecommunications services, canceled).....	4/25/05
XD-2005-0335	Fox Communications Corporation (Certificate of service authority, IXC, canceled).....	4/11/05
LA-2005-0193	France Telecom Corporate Solutions, L.L.C. (Certificate of service authority, IXC and basic local telecommunications services, granted).....	7/11/05
LA-2005-0055	FullTel, Inc. (Certificate of service authority, basic local, local exchange and IXC, granted).....	10/19/04
TK-2005-0079	FullTel, Inc. (Adoption of interconnection agreement between Brooks Fiber Communications of Missouri, Inc. and GTE Midwest Incorporated, d/b/a Verizon Midwest, recognized as to CenturyTel of Missouri, LLC, but not Spectra Communications Group LLC, d/b/a CenturyTel)...	12/21/04
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EO-2005-0122	Gascosage Electric Cooperative and Three Rivers Electric Cooperative (Territorial agreement within Camden, Cole, Franklin, Gasconade, Maries, Miller, Moniteau, Osage, Phelps and Pulaski Counties, approved).....	2/24/05
XM-2005-0106	GE Business Productivity Solutions, Inc. (Certificate of service authority, IXC, canceled).....	4/21/05
XD-2005-0474	Global Communications Consulting Corp. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled).....	7/12/05
XA-2005-0090	Global Connection Incorporated of America (Certificate of service authority, IXC, granted).....	11/9/04
CA-2005-0097	Global Connection Incorporated of America (Certificate of service authority, basic local telecommunications services, granted).....	1/7/05
XD-2005-0317	Global Crest Communications, Inc. d/b/a Dimensions (Certificate of service authority, IXC, canceled).....	4/26/05

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CD-2006-0038	Globcom, Incorporated (Certificate of service authority, resold and facilities-based basic local telecommunications services, null and void).....	8/3/05
TD-2005-0298	Glyphics Communications, Inc. (Certificate of service authority, IXC, canceled).....	4/22/05
TD-2005-0085	GoBeam Services, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services and basic local telecommunications services, canceled).....	10/18/04
TO-2005-0339	Granby Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as agent and General Partner for Wireless Co., L.P. d/b/a Sprint PCS, approved)	5/3/05
ID-2005-0430	GTE Midwest Incorporated, d/b/a Verizon Midwest, and GTE Arkansas Incorporated (Certificate of public convenience and necessity, canceled).....	6/15/05
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WO-2005-0127	Hannibal, City of and Public Water Supply District No. 1 of Ralls County (Water territorial agreement designating the respective service areas in and around Hannibal, approved).....	1/7/05
PD-2006-0011	Harness, Ruby A. d/b/a Antel Communications (Certificate of service authority, pay phones, canceled).....	7/26/05
TN-2005-0101	Heartland Health v. Public Service Commission Staff (Name change from Heartland Health System, Inc. to HeartlandHealth, recognized).....	11/3/04
WR-2005-0126	Hickory Hills Water & Sewer Company, Inc. (Water rate case decision).....	12/16/04
SR-2005-0125	Hickory Hills Water & Sewer Company, Inc. (Sewer rate case decision).....	12/16/04
PA-2005-0070	Hudson, Clete d/b/a Freedom Payphones (Certificate of service authority, pay phones, granted).....	10/27/04
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TA-2005-0451	IBFA Acquisition Company, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	6/27/05
XO-2005-0457	IBFA Acquisition Company, LLC (Acquiring the Missouri assets of American Farm Bureau, Inc. d/b/a The Farm Bureau Connection, granted).....	7/7/05
XA-2006-0032	Infotelecom, LLC (Certificate of service authority, IXC, granted).....	8/16/05
TD-2005-0215	Integrated Telecommunications Services, LLC (Certificate of service authority, IXC and local exchange telecommunications services, canceled).....	1/26/05
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TD-2005-0123	Intercontinental Communications Group, Inc. d/b/a Fusion Telecom (Certificate of service authority, IXC, canceled).....	12/3/04

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TM-2005-0129	Intermedia Communications, Inc. and MCImetro Access Transmission Services, LLC (Merger, order approving merger and canceling certificate and tariff).....	1/4/05
XD-2005-0321	IP Communications Corporation d/b/a IP Communications of the Southwest Corporation (Certificate of service authority, IXC, canceled).....	4/11/05
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XD-2005-0334	JirehCom, Inc. (Certificate of service authority, interexchange and nonswitched local exchange telecommunications service, canceled).....	4/11/05
PD-2005-0413	JRS Services, L.L.C. (Certificate of service authority, pay phones, canceled).....	5/19/05
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EO-2005-0270	Kansas City Power & Light Company (Transfer of assets, 1.02 miles of 161 kV electric transmission line commonly known as the Lake Road-Nashua Line, to Aquila, Inc., granted).....	6/28/05
EF-2005-0387	Kansas City Power & Light (Financing application, approved).....	7/14/05
EF-2005-0388	Kansas City Power & Light (Seeking extension to enter into interest rate management instruments, order approving application).....	7/14/05
PD-2005-0418	K.C. Telecom Services, L.L.C. (Certificate of service authority, private pay phones, canceled).....	6/9/05
XD-2005-0223	Kiger Telephone & Telephony, LLC (Certificate of service authority, IXC, canceled).....	1/26/05
TD-2006-0078	KMC Telecom III, LLC (Certificate of service authority, basic local exchange and IXC, canceled).....	8/23/05
TD-2005-0060	Knob View Telephone Company (Certificate of service authority, IXC, canceled).....	10/5/04
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EO-2005-0391	Laclede Electric Cooperative (Territorial agreement with the City of St. Robert designating the boundaries of each electric supplier within the Hickory Valley Subdivision of the City of St. Robert, approved).....	8/16/05
GO-2005-0119	Laclede Gas Company (Change in its Infrastructure System Replacement Surcharge, order approving agreement).....	1/4/05
GA-2005-0118	Laclede Gas Company (Certificate of public convenience and necessity to provide natural gas service to the City of St. Paul, Missouri, an extension of existing certificated area, granted).....	1/11/05
GR-2003-0224	Laclede Gas Company (2002-2003 Actual Cost Adjustment, order regarding adjustment to ACA balance and adopting PSC Staff recommendations).....	3/3/05
GO-2005-0351	Laclede Gas Company (Proposed Infrastructure System Replacement Surcharge, order approving agreement).....	6/16/05

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EO-2005-0076	LaPlata, City of and Macon Electric Cooperative (Change of electric service provider, seven LaPlata customers to Macon Electric, granted).....	11/5/04
CD-2005-0488	Local Line America, Inc. (Certificate of service authority, basic local telecommunications services, canceled)...	7/14/05
TC-2004-0415 & XE-2004-0488	Lockheed Martin Global Telecommunications Services, Inc., Public Service Commission Staff v. (Complaint case, allegations of failing to file 2002 annual report on time, order granting motion for summary disposition and order authorizing General Counsel to seek penalties).....	11/2/04
XD-2005-0389	Lockheed Martin Global Telecommunications Services, Inc. (Certificate of service authority, IXC, canceled).....	5/10/05
TD-2005-0392	Logix Communications Corporation (Certificate of service authority, basic local telecommunications services, intrastate resold nonswitched local exchange and IXC, canceled).....	6/8/05
XA-2005-0159	Long Distance Consolidated Billing Co. (Certificate of service authority, IXC, granted).....	1/7/05
XD-2005-0073	Long Distance Wholesale Club d/b/a Long Distance Wholesale Club, Inc. (Certificate of service authority, IXC, canceled).....	10/5/04
SR-2005-0338	LW Sewer Corporation (Sewer rate case, order approving agreement).....	5/26/05

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EO-2005-0076	Macon Electric Cooperative, LaPlata, City of and (Change of electric service provider, seven LaPlata customers to Macon Electric, granted).....	11/5/04
CD-2005-0301	Magnus Communications, Inc. (Certificate of service authority, basic local telecommunications services, canceled).....	4/29/05
TD-2005-0240	Max-Tel Communications, Inc. (Certificate of service authority, IXC and basic local telecommunications services, canceled).....	2/15/05
TC-2004-0416	Maxxis Communications, Inc., Public Service Commission Staff v. (Complaint case, certificate of service authority, IXC, canceled).....	2/1/05
TD-2005-0251	Maxcess, Inc. (Certificate of service authority, IXC and basic local telecommunications services, canceled).....	2/17/05
LA-2005-0150	MCC Telephony of Missouri, Inc. (Certificate of service authority, IXC, basic local and nonswitched local telecommunications services, granted).....	5/5/05
LO-2005-0383	MCImetro Access Transmission Services, LLC (Amendment to interconnection agreement with CenturyTel of Missouri, LLC, approved).....	6/2/05
XD-2005-0233	Mercury Long Distance, Inc. (Certificate of service authority, IXC, canceled).....	1/18/05
PD-2005-0411	Metrophone Telecommunications, Inc. (Certificate of service authority, pay phones, canceled).....	5/25/05
XA-2005-0426	Metropolitan Telecommunications of Missouri, Inc. (Certificate of service authority, IXC, granted).....	6/17/05

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CA-2005-0425	Metropolitan Telecommunications of Missouri, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	8/23/05
XD-2005-0096	MG LLC d/b/a SearsConnect (Certificate of service authority, IXC, canceled).....	10/20/04
PD-2005-0380	Micro-Tel, Inc. (Certificate of service authority, pay phones, canceled).....	5/3/05
TK-2005-0227	Mid-Missouri Telephone Company (Interconnection agreement with ALLTEL Communications, Inc., approved).....	2/17/05
TO-2005-0481	Mid-Missouri Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	7/21/05
TO-2005-0381	Miller Telephone Company (Interconnection agreement with Sprint Spectrum L.P., as agent and General Partner for Wireless Co., L.P. d/b/a Sprint PCS, approved).....	5/25/05
WO-2005-0286	Missouri-American Water Company (Application to construct mains and point of delivery to sell and deliver water to the City of Kirkwood, granted).....	7/21/05
GA-2005-0053	Missouri Gas Energy (Certificate of public convenience and necessity, expansion of its service area in Christian County, granted).....	11/9/04
GA-2005-0107	Missouri Gas Energy (Certificate of public convenience and necessity to provide service in a portion of Greene County, expansion of existing certificated area, granted)	12/30/04
GE-2005-0247	Missouri Gas Energy (Variance from a Commission rule that limits the hours in which MGE may discontinue service to a customer, order granting variance).....	3/17/05
GO-2005-0273	Missouri Gas Energy (Establishment of an infrastructure system replacement surcharge, approved).....	5/3/05
CA-2005-0353	Missouri Network Alliance, L.L.C. (Certificate of service authority, basic local telecommunications services, granted).....	5/19/05
PD-2005-0416	Missouri Payphone, Inc. (Certificate of service authority, pay phones, canceled).....	5/25/05
TK-2005-0187	Missouri RSA No. 5 Partnership d/b/a Chariton Valley Wireless (Order recognizing adoption of interconnection agreement between Spectra Communications Group, LLC and WWC License, LLC).....	2/2/05
TK-2005-0447	Missouri RSA No. 5 Partnership d/b/a Chariton Valley Wireless (Interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved)	7/20/05
PD-2005-0108	Missouri Telcom (Certificate of service authority, pay phones, canceled).....	10/27/04
TD-2005-0360	M.L.M. Telecommunications, Inc. d/b/a Ameritel, Your Phone Company (Certificate of service authority, basic local telecommunications services, IXC and non-switched local exchange telecommunications service, canceled).....	4/25/05
TK-2005-0231	MoKan Dial (Interconnection agreement with ALLTEL Communications, Inc., approved).....	2/17/05

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TO-2005-0484	MoKan Dial, Inc. (Interconnection agreement with United States Cellular Corporation, approved).....	7/21/05
TK-2005-0462	MoKan Dial Telephone Company (Interconnection agreement with T-Mobile USA Inc., approved).....	7/6/05
XM-2005-0124	Motion Telecom, Inc. (Transfer of assets and subscribers to Network US, Inc. d/b/a CAAffinity, granted).....	11/30/04
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TC-2004-0329	Natel, L.L.C., Public Service Commission Staff v. (Certificate of service authority, IXC, canceled).....	6/23/05
XA-2005-0130	Nationwide Professional Teleservices, LLC (Certificate of service authority, IXC, granted).....	12/17/04
XA-2005-0115	Network PTS, Inc. (Certificate of service authority, IXC, granted).....	11/23/04
TD-2005-0256	Network Services, Inc. d/b/a Long Distance Network Services, Inc. (Certificate of service authority, IXC, canceled).....	2/17/05
XA-2005-0421	Network Service Billing, Inc. (Certificate of service authority, IXC, granted).....	6/29/05
XA-2006-0034	Neutral Tandem-Missouri LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	8/23/05
XD-2006-0010	New Concept Communications, LLC (Certificate of service authority, IXC, canceled).....	8/17/05
TC-2004-0397	News-Press & Gazette Company d/b/a St. Joseph Cablevision, Public Service Commission Staff v. (Complaint case, allegation of failing to file 2002 annual report, order denying relief and canceling certificate of service authority to provide IXC and non-switched local telecommunications services).....	10/28/04
TK-2005-0309	Nextel West Corp. d/b/a Nextel (Amendments to interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved).....	4/26/05
XA-2005-0445	NextG Networks of Illinois, Inc., d/b/a NextG Networks Central (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	6/30/05
LA-2005-0191	nii communications, Ltd., L.P. (Certificate of service authority, basic local exchange, non-switched local exchange and IXC, granted).....	3/21/05
WR-2005-0452	Noel Water Company (Water rate case, order approving small company rate increase).....	6/16/05
XD-2006-0006	Norstar Communications, Inc., d/b/a Business Savings Plan, Inc. (Certificate of service authority, IXC, canceled).....	7/27/05
IF-2005-0112	Northeast Missouri Rural Telephone Company (Order approving financing).....	11/30/04
TK-2005-0226	Northeast Missouri Rural Telephone Company (Interconnection agreement with ALLTEL Communications, Inc., approved).....	2/17/05

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TO-2005-0480	Northeast Missouri Rural Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	7/21/05
XD-2006-0022	NorVergence, Inc. (Certificate of service authority, IXC, canceled).....	7/27/05
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XO-2005-0192	OneStar Long Distance, Inc. (Certificate of service authority, IXC, canceled).....	7/12/05
XD-2005-0239	Operator Communications, Inc. d/b/a Oncor Communications, Inc. (Certificate of service authority, IXC, canceled).....	2/2/05
XD-2006-0069	Orion Telecommunications Corp. (Certificate of service authority, IXC, canceled).....	8/22/05
TD-2005-0236	Ozark Telecom, Inc. d/b/a Ozark Telecom of Arkansas, Inc. (Certificate of service authority, IXC, canceled).....	2/1/05
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TO-2005-0322	Peace Valley Telephone Company (Interconnection agreement with Sprint Spectrum, L.P., as agent and General Partner for Wireless Co., L.P. d/b/a Sprint PCS, approved).....	4/27/05
CA-2005-0054	PAETEC Communications, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	10/20/04
PD-2005-0303	Pay-Tele Communications, Inc. d/b/a Midwest Telecom (Certificate of service authority, pay phones, canceled)..	4/1/05
GE-2005-0158	Perry, City of (Permanent waiver of certain gas safety rules as they pertain to the qualification requirements for persons making joints in plastic pipe, order granting waiver).....	3/3/05
XD-2005-0261	Phoenix Network, Inc. d/b/a Office Depot Communications(Certificate of service authority, IXC, canceled).....	2/25/05
TD-2005-0254	Phone Debit Systems, Inc. (Certificate of service authority, IXC, canceled).....	2/2/05
CD-2006-0065	Phone-Link, Inc. (Certificate of service authority, basic local exchange telecommunications services, canceled)	8/23/05
TA-2005-0098	Phone1, Inc. (Certificate of service authority, IXC, granted).....	11/19/04
XD-2005-0372	Phonetec PCS, LLC (Certificate of service authority, IXC, canceled).....	6/3/05
CN-2005-0186	PNG Telecommunications, Inc. (Name change to PowerNet Global Communications, recognized).....	1/12/05
TD-2005-0170	Prism Missouri Operations, LLC (Certificate of service authority, IXC, basic local exchange and non-switched private line local exchange telecommunications services, canceled).....	12/29/04
TC-2004-0311	Public Service Commission Staff v. Cable One, Inc. (Complaint case alleging Cable One failed to file its 2002 Annual Report, order canceling certificate and tariffs)	10/12/04

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TC-2004-0340	Public Service Commission Staff v. Econo-Call, Inc. (Complaint case, certificate of service authority, IXC, canceled).....	10/5/04
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TC-2004-0416	Public Service Commission Staff v. Maxxis Communications, Inc. (Complaint case, certificate of service authority, IXC, canceled).....	2/1/05
TC-2004-0329	Public Service Commission Staff v. Natel, L.L.C. (Certificate of service authority, IXC, canceled).....	6/23/05
TC-2004-0397	Public Service Commission Staff v. News-Press & Gazette Company d/b/a St. Joseph Cablevision (Complaint case, allegation of failing to file 2002 annual report, order denying relief and canceling certificate of service authority to provide IXC and non-switched local telecommunications services).....	10/28/04
WC-2004-0348	Public Service Commission Staff v. Rex Deffenderfer Enterprises, Inc. (Complaint case, allegations failing to file 2002 annual report on time, determination on the pleadings and order directing General Counsel to seek penalties).....	10/7/04
WC-2005-0495	Public Service Commission Staff v. Roy-L Utilities, Inc. (Complaint case, allegations of failure to pay annual assessment for 2004 and 2005 and failure to file annual report for 2003 and 2004, order granting default).....	7/28/05
TC-2004-0406	Public Service Commission Staff v. St. John's Regional Medical Center (Complaint case, allegations of failing to timely file 2002 annual report, order directing General Counsel to seek penalties).....	10/19/04
WC-2005-0493	Public Service Commission Staff v. Swiss Villa Utilities, Inc. (Complaint case, allegations of failure to pay annual assessment for 2004 and 2005 and failure to file annual report for 2003, order granting default).....	7/28/05
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WC-2004-0342	Public Service Commission Staff v. Taney County Utilities Corporation (Complaint case, allegations of failing to file 2002 annual report by April 15, 2003, determination on the pleadings and order authorizing General Counsel to seek penalties).....	10/19/04
WC-2005-0494	Public Service Commission Staff v. The Willows Utility Company (Complaint case, allegations of failure to pay annual assessment for 2004 and 2005 and failure to file annual report for 2003, order granting default).....	7/28/05

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WO-2005-0084	Public Water Supply District No. 10 of Boone County, Centralia, City of (Water territorial agreement within Boone and Audrain Counties, order approving agreement).....	11/23/04
WO-2005-0127	Public Water Supply District No. 1 of Ralls County, Hannibal, City of (Water territorial agreement designating the respective service areas in and around Hannibal, approved).....	1/7/05
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TD-2005-0135	QAI, Inc., d/b/a Long Distance Billing (Certificate of service authority, IXC, canceled).....	12/7/04
TD-2005-0318	QCC, Inc. (Certificate of service authority, shared tenant services and basic exchange and local exchange intrastate telecommunications services, canceled).....	4/8/05
XA-2005-0385	Quasar Communications Corporation, (Certificate of service authority, IXC, granted).....	5/23/05
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WR-2005-0052	Raytown Water Company (Rate request, order approving agreement).....	10/21/04
WC-2004-0348	Rex Deffenderfer Enterprises, Inc., Public Service Commission Staff v. (Complaint case, allegations failing to file 2002 annual report on time, determination on the pleadings and order directing General Counsel to seek penalties).....	10/7/04
SR-2005-0153 & WR-2005-0154	Roark Water & Sewer Company (Water and sewer rate case decisions).....	1/13/05
TD-2005-0410	Rosacker, John Jay (Certificate of service authority, pay phones, canceled).....	5/25/05
WC-2005-0495	Roy-L Utilities, Inc., Public Service Commission Staff v. (Complaint case, allegations of failure to pay annual assessment for 2004 and 2005 and failure to file annual report for 2003 and 2004, order granting default).....	7/28/05
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TK-2005-0113	SBC Advanced Solutions, Inc. (Interconnection agreement with New Edge Network, Inc., d/b/a New Edge Networks, approved).....	12/14/04
TK-2005-0459	SBC Advanced Solutions, Inc. (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved).....	7/8/05
TD-2005-0211	SBA Broadband Services, Inc. (Certificate of service authority, IXC and local telecommunications services, canceled).....	1/11/05
XD-2005-0204	Secured Technologies, L.C. (Certificate of service authority, IXC, canceled).....	1/20/05
TD-2005-0433	Servisense.com, Inc. (Certificate of service authority, basic local telecommunications services and IXC, canceled).....	6/16/05

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CA-2005-0175	Sho-Me Technologies, LLC (Certificate of service authority, basic local exchange telecommunications services, granted).....	3/15/05
XD-2005-0434	Sigma Networks Telecommunications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled).....	6/14/05
WO-2005-0206	Silverleaf Resorts, Inc. (Sale of assets to Algonquin Water Resources of Missouri, LLC, approved).....	8/4/05
CD-2005-0243	Snappy Phone of Texas, Inc. d/b/a Snappy Phone (Certificate of service authority, IXC, basic local telecommunications service, canceled).....	3/9/05
CO-2005-0066	Socket Telecom, LLC (Request Commission acceptance or confirmation that Socket has adopted the interconnection agreement between GTE Midwest Incorporated and AT&T Communications of the Southwest, Inc. for interconnection with the exchanges served by Spectra Communications Group, LLC, denied).....	12/14/04
TO-2005-0397	Socket Telecom, LLC (Review and reversal of North American Numbering Plan Administrator's decision to withhold numbering resources, order granting additional numbering resources).....	5/26/05
TD-2005-0216	Sonix4U, Inc. (Certificate of service authority, IXC, canceled).....	1/24/05
PA-2005-0092	Sonnier, Barbara d/b/a DBS (Certificate of service authority, pay phones, granted).....	11/1/04
GR-2005-0064	Southern Missouri Gas Company, L.P. (2003-2004 Actual Cost Adjustment, order establishing ACA balance and closing case).....	8/16/05
WA-2005-0268	Southtown Utilities Company, Inc. (Certificate of public convenience and necessity, water and sewer service to various customers in Polk County, granted).....	8/23/05
TN-2005-0149	Southwestern Bell Communications Services, Inc. d/b/a SBC Long Distance (Name change to SBC Long Distance, Inc., acknowledged).....	12/9/04
TK-2005-0068	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Ameritech St. Louis Paging Corporation, approved).....	10/18/04
TK-2005-0288	Southwestern Bell Telephone L.P., d/b/a SBC Missouri (Interconnection agreement with Northwest Missouri Cellular Limited Partnership d/b/a Northwest Missouri Cellular, approved).....	4/5/05
TO-2005-0312	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Order granting additional numbering resources)...	4/19/05
TO-2005-0315	Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri (Post-TRO remand amendment to the interconnection agreement with Nexus Communications, Inc., d/b/a TSI, approved).....	4/27/05
TO-2005-0323	Southwestern Bell Telephone L.P. d/b/a SBC Missouri (Order reversing decision of the North American Numbering Plan Administrator and closing case).....	5/5/05

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TO-2005-0406	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Review and reversal of North American Numbering Plan Administrator's decision to withhold numbering resources, order reversing decision of administrator and closing case).....	5/26/05
TK-2006-0044	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Sprint Communications Company, L.P., approved).....	8/5/05
TK-2006-0057	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Negotiated interconnection agreement with TCG St. Louis, Inc. approved).....	8/8/05
TK-2006-0042	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Navigator Telecommunications, L.L.C., approved)	8/8/05
TK-2006-0056	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Negotiated interconnection agreement with TCG Kansas City, Inc., approved).....	8/8/05
TK-2006-0050	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with the MCI Group, including MCI WorldCom Communications, Inc., and MCImetro Access Transmission Services, L.L.C., approved).....	8/8/05
TK-2006-0055	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Negotiated interconnection agreement with AT&T Communications of the Southwest, Inc., approved).....	8/8/05
TK-2006-0049	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with the CLEC Coalition, including Big River Company, L.L.C., Birch Telecom of Missouri, Inc., ionex communications, Inc., NuVox Communications of Missouri, Inc., Socket Telecom, L.L.C., XO Communications Services, Inc., XO Missouri, Inc., and Xspedius Management Company Switched Services, L.L.C., d/b/a Xspedius Communications, L.L.C., approved).....	8/8/05
TK-2006-0047	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Charter Fiberlink-Missouri, L.L.C., approved).....	8/8/05
TK-2006-0046	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with WilTel Local Network, L.L.C., approved).....	8/10/05
TK-2006-0070	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with XO Communications Services, Inc. and XO Missouri, Inc., approved).....	8/12/05
TK-2006-0073	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Big River Telephone Company, LLC, approved).....	8/12/05
TK-2006-0072	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with NuVox Communications of Missouri, Inc., approved).....	8/12/05

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TK-2006-0048	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Birch Telecom of Missouri, Inc. and ionex communications, Inc., approved).....	8/12/05
TK-2006-0071	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Socket Telecom, LLC, approved).....	8/12/05
TK-2006-0043	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Xspedius Management Co. of Kansas City, L.L.C., and Xspedius Management Co. Switched Services, L.L.C., approved)..	8/15/05
TK-2005-0453	Spectra Communications Group, LLC (Interconnection agreement with Chariton Valley Telecom Corporation, approved).....	7/12/05
TK-2005-0121	Sprint Missouri, Inc., d/b/a Sprint (Master resale agreement with Global Connection, Inc. of America, approved)	12/9/04
TO-2005-0093	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with ALLTEL Communications, Inc. and the ALLTEL-controlled partnership Missouri RSA #4 Partnership, approved).....	12/16/04
IK-2005-0151	Sprint Missouri, Inc. d/b/a Sprint (Master interconnection and resale agreement with FamilyTel of Missouri, LLC, approved).....	12/16/04
IK-2005-0152	Sprint Missouri, Inc. d/b/a Sprint (Master interconnection and resale agreement with Intermedia Communications, Inc., approved).....	1/28/05
TK-2005-0278	Sprint Missouri, Inc. (Master interconnection agreement with Sprint Communications Company L.P., approved).....	3/31/05
TO-2005-0290	Sprint Missouri, Inc. (Tariff introducing bundled service called "Special Plan-Metro Bundle", approved).....	4/12/05
IK-2005-0310	Sprint Missouri, Inc. d/b/a Sprint (Interconnection and resale agreement with SBC Advanced Solutions, Inc., approved).....	5/6/05
IK-2005-0438	Sprint Missouri, Inc. (Resale agreement with Granite Telecommunications LLC, granted).....	6/27/05
TK-2005-0446	Sprint Missouri, Inc. (Interconnection, collocation and resale agreement with New Edge Network, Inc. d/b/a New Edge Networks, granted).....	6/27/05
IK-2006-0017	Sprint Missouri, Inc. d/b/a Sprint (Interconnection, collocation and resale agreement with KMC Telecom V, Inc., approved).....	8/16/05
IK-2006-0019	Sprint Missouri, Inc. d/b/a Sprint (Interconnection, collocation and resale agreement with KMC Data LLC, approved).....	8/16/05
TO-2005-0337	Steelville Telephone Exchange, Inc. (Interconnection agreement with Sprint Spectrum, L.P., as agent and General Partner for Wireless Co., L.P. d/b/a Sprint PCS, approved).....	5/3/05
TO-2004-0406	St. John's Regional Medical Center, Public Service Commission Staff v. (Complaint case, allegations of failing to timely file 2002 annual report, order directing General Counsel to seek penalties).....	10/19/04

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ZD-2005-0147	St. John's Regional Medical Center (Certificate of service authority, shared tenant services, canceled).....	1/4/05
WR-2005-0455	Suburban Water & Sewer Company (Water rate request).....	6/16/05
WC-2005-0493	Swiss Villa Utilities, Inc., Public Service Commission Staff v. (Complaint case, allegations of failure to pay annual assessment for 2004 and 2005 and failure to file annual report for 2003, order granting default).....	7/28/05
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XM-2005-0492	Talk America Inc. (Purchase of the stock of LDMI Telecommunications, Inc. d/b/a LDMI Telecommunications, and Long Distance of Michigan, Inc. d/b/a FoneTel (LDMI), approved).....	8/2/05
WC-2004-0342	Taney County Utilities Corporation, Public Service Commission Staff v. (Complaint case, allegations of failing to file 2002 annual report, order setting aside default).....	10/5/04
WC-2004-0342	Taney County Utilities Corporation, Public Service Commission Staff v. (Complaint case, allegations of failing to file 2002 annual report by April 15, 2003, determination on the pleadings and order authorizing General Counsel to seek penalties).....	10/19/04
XD-2005-0361	TDI Communications, Inc. (Certificate of service authority, IXC, canceled).....	4/27/05
XA-2005-0061	Telecom Management, Inc. d/b/a Pioneer Telephone (Certificate of service authority, IXC, granted).....	10/12/04
TD-2005-0224	TELECOM EZ Corp. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled).....	1/28/05
TD-2005-0390	Telegenius, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled).....	6/1/05
TD-2005-0255	Telenational Communications Limited Partnership (Certificate of service authority, IXC, canceled).....	2/28/05
XD-2006-0074	Telephone Company of Central Florida, Inc. (Certificate of service authority, IXC, canceled).....	8/22/05
TD-2005-0491	Teligent Services, Inc. (Certificate of service authority, IXC, basic local and local exchange telecommunications services, canceled).....	7/28/05
TD-2005-0183	Tel-Link, L.L.C. (Certificate of service authority, basic local telecommunications services, canceled).....	1/13/05
XO-2005-0192	Telrite Corporation (Seeking to buy OneStar Long Distance, Inc.'s assets and customer base, order approving joint application).....	2/17/05
EO-2005-0275	The Empire District Electric Company (First addendum to second territorial agreement with White River Valley Electric Cooperative, approved).....	4/13/05
TD-2006-0026	The Empire District Electric Company (Certificate of service authority, local exchange and IXC services, canceled).....	8/3/05
TD-2005-0232	The Free Network, LLC (Certificate of service authority, IXC, canceled).....	1/18/05

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WC-2005-0494	The Willows Utility Company, Public Service Commission Staff v. (Complaint case, allegations of failure to pay annual assessment for 2004 and 2005 and failure to file annual report for 2003, order granting default).....	7/28/05
EO-2005-0122	Three Rivers Electric Cooperative and Gascosage Electric Cooperative (Territorial agreement within Camden, Cole, Franklin, Gasconade, Maries, Miller, Moniteau, Osage, Phelps and Pulaski Counties, approved).....	2/24/05
TD-2005-0181	Tin Can Communications Company, L.L.C., d/b/a The Cube (Certificate of service authority, basic local telecommunications services, canceled).....	1/5/05
PA-2005-0081	Titan Communications, L.L.C. (Certificate of service authority, pay phones, granted).....	11/2/04
PA-2006-0021	T-NETIX Telecommunications Services, Inc. (Certificate of service authority, pay phones, granted).....	8/22/05
PA-2005-0349	TON Services Inc. (Certificate of service authority, pay phones, granted).....	4/25/05
XD-2005-0289	Total Communication Services, Inc. (Certificate of service authority, IXC, canceled).....	3/18/05
TD-2005-0319	Total Communication Services, Inc. (Certificate of service authority, IXC, canceled).....	4/22/05
CA-2005-0133	Trans National Communications International, Inc. (Certificate of service authority, basic local telecommunications services on a facilities-based and resold basis, granted).....	2/10/05
PD-2005-0362	Trintel Communications, Inc. (Certificate of service authority, pay phones, canceled).....	4/27/05
XD-2005-0435	Twister Communications Network, Inc. (Certificate of service authority, IXC, canceled).....	6/9/05
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CA-2005-0131	UCN, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	1/28/05
TD-2005-0320	UKI Communications, Inc. (Certificate of service authority, IXC, canceled).....	4/22/05
EE-2004-0267	Union Electric Company d/b/a AmerenUE (Request for a variance from Commission rule related to metering, order approving agreement).....	11/2/04
EO-2005-0034	Union Electric Company d/b/a AmerenUE (Sale of two transmission lines to Citizens Electric Corporation, granted).....	2/8/05
GR-2003-0326	Union Electric Company d/b/a AmerenUE (2002-2003 Actual Cost Adjustment, order adopting PSC Staff recommendation and requiring adjustment of ACA balance)	2/10/05
EO-2005-0369	Union Electric Company d/b/a AmerenUE (Sale of a transformer to Behnen's Container Service, granted).....	6/16/05
EF-2003-0514	Union Electric Company d/b/a AmerenUE (Order granting application to supplement authority to issue and sell additional indebtedness).....	7/7/05

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EE-2005-0400	Union Electric Company d/b/a AmerenUE (Order granting variance to permit master metering for a residential apartment building that its customer is building as housing for low income, elderly persons).....	7/7/05
TD-2005-0327	United Communications Hub, Inc. (Certificate of service authority, IXC, canceled).....	4/29/05
TD-2005-0140	United States Advanced Network, Inc. (Certificate of service authority, IXC, canceled).....	12/2/04
TD-2005-0326	United Systems Access Telecom, Inc. (Certificate of service authority, IXC, canceled).....	4/21/05
TD-2005-0168	Univance Telecommunications, Inc. (Certificate of service authority, IXC, canceled).....	12/29/04
XD-2006-0007	Universal Broadband Communications, Inc., d/b/a Business Savings Plan (Certificate of service authority, IXC, canceled).....	7/12/05
TK-2005-0431	USCOC of Greater Missouri, LLC, d/b/a U.S. Cellular (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved).....	7/8/05
XD-2005-0137	USLD Communications, Inc. f/k/a US Long Distance, Inc. (Certificate of service authority, IXC, canceled).....	11/29/04
TD-2005-0244	US Wats, Inc. (Certificate of service authority, IXC, canceled).....	2/7/05
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TD-2005-0238	Valor Telecommunications CLEC of Missouri, LLC (Certificate of service authority, basic local exchange telecommunications services, null and void).....	2/3/05
PD-2005-0234	Vaughan, Christopher L.; Wells, Gerald; Fennelly, James B.; Kean, Roger G.; Winkley, Steve; Johnson, Anthony; Scarry, Michael D.; Gray, Andino; Plescia, Anthony D.; Koenig, Brian E.; Thomas, Dennis; Fort, Gaines H.; Rounds, Jamie; Graefe, Sam W.; Crooker, Shaun; Thomson, Sherry L.; Gatto, Rebecca; Becherer, Paul O.; Uppal, Mohammed; Eubanks, Joe; Becker, Tyson; Cavanaugh, Matthew; Kim, Won Y.; Hartman, Eileen M.; Labombard, Michael; and Cox, Kenneth P. (Certificate of service authority, pay phones, canceled).....	1/31/05
PA-2005-0225	Veach, Nathan (Certificate of service authority, pay phones, granted).....	2/28/05
TK-2005-0414	Verizon Wireless (VAW) LLC, d/b/a Verizon Wireless (referred to as VZW), (Amendment to a previously approved interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri; and recognition of the adoption of the VZW/SBC Missouri interconnection agreement by Cellco Partnership, d/b/a Verizon Wireless, and CyberTel Cellular Telephone Company, d/b/a Verizon Wireless VZW, Cellco, and CyberTel, granted).....	8/3/05
CD-2005-0505	Victory Communications, Inc. (Certificate of service authority, basic local telecommunications services, canceled).....	8/1/05

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XD-2006-0009	WesTex Communications, LLC, d/b/a WTX Communications (Certificate of service authority, IXC, canceled).....	8/17/05
PD-2005-0138	Wilkerson, John S. (Certificate of service authority, pay phones, canceled).....	12/3/04
PA-2005-0100	Wright, Calvin Wayne d/b/a E-Tech Terminals (Certificate of service authority, pay phones, granted).....	12/1/04
TD-2005-0163	World Communications Satellite Systems, Inc. (Certificate of service authority, IXC, canceled).....	12/27/04
XD-2005-0497	WWC License LLC d/b/a Cellular One Long Distance (Certificate of service authority, IXC, canceled).....	6/29/05

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TK-2005-0465	XO Communications Services, Inc., f/k/a XO Missouri, Inc. and Allegiance Telecom of Missouri, Inc. (Interconnection agreements with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, order approving amendments to agreements).....	7/13/05
TK-2005-0504	XO Communications Services, Inc. f/k/a XO Missouri, Inc. and Allegiance Telecom of Missouri, Inc. (Amendment to interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved).....	8/30/05
LO-2005-0027	XO Missouri, Inc. and Allegiance Telecom of Missouri, Inc. (Merge into XO Communications Services, Inc., and certificate of service authority, basic local, nonswitched local and IXC to XO Communications Services, granted)..	10/28/04
LO-2005-0027	XO Missouri, Inc. (Certificate of service authority, IXC and local telecommunications services, canceled).....	3/14/05

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LN-2005-0165	Z-Tel Communications, Inc. (Name change to Trinsic Communications, Inc., recognized).....	12/29/04
LN-2005-0165	Z-Tel Communications, Inc. (Name change to Trinsic Communications, Inc., recognized).....	2/15/05
PA-2005-0059	Zini, Brett S. d/b/a Zini's Imagineering (Certificate of service authority, pay phones, granted).....	10/4/04
PD-2006-0058	Zini, Brett S., d/b/a Zini's Imagineering (Certificate of service authority, pay phones, canceled).....	8/8/05
XA-2005-0314	Zoom-I-Net Communications, Inc. (Certificate of service authority, IXC, granted).....	5/4/05

**REPORTS OF
THE PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI**

**In the Matter of the Notice of Election of ALLTEL Missouri, Inc.,
to be Price-Cap-Regulated under Section 392.245, RSMo
2000.***

*Case No. IO-2002-1083
Decided October 5, 2004*

Certificates §46.3. The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide basic local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.

Service §31. The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide basic local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.

Telecommunications §1. The Commission found that ALLTEL's election to become a price-cap regulated carrier invalid under Section 392.245, RSMo 2000.

Telecommunications §§23, 29. The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide basic local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.

Telecommunications §47. The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.

*See page 467, Volume 12 MPSC 3d, for another order in this case. The Commission, in an order issued on October 28, 2004, denied an application for rehearing. This case was appealed to Cole County Circuit Court (04CV326591).

APPEARANCES

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Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Lewis Mills, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: This order finds that ALLTEL Missouri, Inc.'s notice of election to become a price cap-regulated carrier under Section 392.245.2, RSMo 2000,¹ is invalid.

Preface

After the Commission issued its Report and Order on July 20, 2004, ALLTEL filed an application for rehearing, pointing out what it believed were flaws in the Commission's decision. The Commission granted the application for rehearing, and now issues this Second Report and Order. In this order, the Commission reaches the same result as the July 20 order, but more fully develops its reasoning.

Procedural History

On May 20, 2002, ALLTEL Missouri, Inc., notified the Commission that it was electing to be regulated under the "price cap" provisions of Section 392.245.2. The Staff of the Missouri Public Service Commission filed a motion requesting that the Commission reject ALLTEL's price cap election. A prehearing conference was held on July 1, 2002. Thereafter, the parties jointly requested that this proceeding be suspended until similar issues were decided in two other pending Commission cases.²

The Commission decided the *BPS Telephone Company* case based on specific facts³ and dismissed the *Investigation* case. On January 21, 2004, the Commission adopted a procedural schedule in this matter. On February 20, 2004, the parties filed a Stipulation of Facts. The parties later submitted Initial Briefs and Reply Briefs. No request for hearing was made.

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

² *In the matter of BPS Telephone Company's Election to be Regulated Under Price-cap regulation as Provided in Section 392.245, RSMo 2000*, Case No. IO-2003-0012, and *In the Matter of the Investigation of the Status of Prepaid Local Service Providers As Alternative Local Exchange Competitors Under Section 392.245, RSMo.*, Case No. CO-2002-1078.

³ The Commission decided that BPS was not a price cap company, but based its decision on the non-compete clause in the BPS-MSDT interconnection agreement and did not decide the issue of whether a reseller was providing basic local service.

Discussion

Because the parties stipulated to the facts of this case, the only issue for Commission determination is whether Missouri State Discount Telephone and Universal Telecom, Inc., are providing basic local telecommunications service in ALLTEL's service area.

Findings of Fact

The parties stipulated to the facts and agreed that "the Commission may take official notice of Commission rules, tariffs, orders, and any other information contained in a document on file as a public record with the Commission."⁴ The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. Thus the Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission takes official notice of its official case files, tariffs, and orders cited herein.

ALLTEL is a small incumbent local exchange company serving approximately 69,000 access lines in Missouri.⁵ ALLTEL provided written notice to the Commission of its intent to be regulated under the price cap statute⁶ on May 17, 2002.⁷

On October 12, 2001, Universal filed an application for a certificate of service authority to provide basic local telecommunications service. Universal requested authority to operate in small ILEC exchanges including ALLTEL. Universal specifically stated in its Application that it "shall, throughout the service area of the small incumbent local exchange telecommunication company, offer all telecommunications services which the Commission determines are essential for purposes of qualifying for State Universal Services Fund support"⁸ and that it intended "to offer and provide all forms of basic local telecommunications services on a prepaid basis, including: (1) Basic Residential Exchange Services (Local Exchange Flat Rate, operator access, etc.); and (2) Residential custom and Class Features (call waiting, caller ID, call forwarding, etc.)."⁹

⁴ *Joint Response to Order Granting Extension of Time*, filed February 20, 2004, Attachment 1 (referred to hereafter as "Stipulation of Facts"), para. 13.

⁵ Stipulation of Facts, para. 1.

⁶ Section 392.245, RSMo.

⁷ Notice of Election To Be Price-cap Regulated, filed May 17, 2002; See also, Stipulation of Facts, para. 2.

⁸ *Application for Certificate of Service Authority to Provide Basic Local Exchange Telecommunications Service in Small Incumbent Local Exchanges and for Competitive Classification*, Case No. TA-2002-183, filed October 12, 2001, para. IV.1.a.

⁹ *Id.*, para. IV.2.

In its order granting the certificate of service authority, the Commission specifically found that “Universal Telecom stated in its verified application that it will offer each of the telecommunications services defined by the Commission as essential to qualify for state universal service fund support as found in 4 CSR 240-31.010(5), in any area served by a small ILEC. . . . Therefore, the Commission finds that Universal Telecom will offer all telecommunications services, which the Commission has determined are essential for purposes of qualifying for state universal service fund support, throughout the service area of the small ILEC.”¹⁰ Furthermore, the Commission specifically granted the certificate only on the condition¹¹ that:

If the service areas in which Universal Telecom seeks to compete is serviced by a small ILEC, Universal Telecom will offer services essential to qualify for state universal service fund support . . . and comply with the Commission rules and regulations for tariffs, service standards, reports, and other information filings as the Commission requires of the incumbent with which the Applicant seeks to compete, pursuant to Section 392.451, RSMo.¹²

At the time ALLTEL notified the Commission of its election to be price-cap regulated, Universal provided telecommunications service to customers within the ALLTEL service area pursuant to its lawfully approved tariff.¹³ Universal has a Commission-approved Interconnection Agreement with ALLTEL.¹⁴ The Interconnection Agreement between Universal and ALLTEL does not contain a provision similar to the one determined to be a non-compete clause in the *BPS Telephone Company* case.¹⁵

On November 29, 2000, MSDT filed an application for a certificate of service authority to provide basic local telecommunications service. MSDT stated that it would “provide all forms of basic local telecommunications service, including all options and features provided by all incumbent providers”¹⁶ In the same case, the parties¹⁷ filed a Unanimous Stipulation and Agreement in which MSDT committed to “comply with section 392.451 and provide the ‘essential local

¹⁰ *Order Granting Certificate to Provide Basic Local Telecommunications Services*, Case No. TA-2002-183, issued March 21, 2002, p. 4.

¹¹ *Id.*, Ordered para. 1.

¹² *Id.*, p. 6.

¹³ Universal Telecom, Inc., P.S.C. Mo. Tariff No. 1.

¹⁴ *Order Approving Interconnection Agreement*, Case. No. TO-2001-360, effective February 1, 2001; See also, Stipulation of Facts, para. 5.

¹⁵ Case No. IO-2003-0012; see also, Stipulation of Facts, para. 5.

¹⁶ *Application for Certificate of Service Authority for Competitive Classification*, Case No. TA-2001-334, filed Nov. 29, 2000, para. 4.

¹⁷ MSDT, the Office of the Public Counsel, the Staff of the Commission, the Missouri Independent Telephone Group, and the Small Telephone Company Group. The last two parties consist of substantially all of the small telephone companies in Missouri.

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telecommunications services' listed in 4 CSR 240-31.010(5).¹⁸ In its order granting MSDT a certificate, the Commission approved the Stipulation and Agreement, noted that MSDT agreed to provide all the essential services in 4 CSR 240-31.010(5), and found that MSDT met "the statutory requirements for [the] provision of basic local telecommunications services and has agreed to abide by those requirements in the future."¹⁹ Also, in the order granting MSDT a certificate, the Commission specifically made MSDT's certificate subject to "the conditions of certification set out above and to all applicable statutes and Commission rules except as specified in this order."²⁰

At the time ALLTEL notified the Commission of its election to be price-cap regulated, MSDT provided telecommunications service to customers within the ALLTEL service area pursuant to its lawfully approved tariff.²¹ MSDT has a Commission-approved Interconnection Agreement with ALLTEL.²² The Interconnection Agreement between MSDT and ALLTEL does not contain a provision similar to the one determined to be a non-compete clause in the *BPS Telephone Company* case.²³

ALLTEL provides two way switched voice service within a local calling scope as determined by the Commission including all the basic local services set out in Section 386.020(4).²⁴

MSDT and Universal each provide two-way switched voice service within a local calling scope as determined by the Commission comprised of the following services:²⁵

- (a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges.
- (b) Access to local emergency services including, but not limited to, 911 service established by local authorities.
- (c) Standard intercept service.
- (d) One standard white pages directory listing.

¹⁸ *Unanimous Stipulation and Agreement*, Case No. TA-2001-334, filed Feb. 28 2001, para. 1.

¹⁹ *Order Granting Certificate*, Case No. TA-2001-334, para. D.

²⁰ *Id.*, Ordered para. 2.

²¹ Missouri State Discount Telephone, P.S.C. No. 1.

²² *Order Approving Interconnection Agreement*, Case. No. TO-2000-469, effective May 2, 2000; *See also*, Stipulation of Facts, para. 10.

²³ Case No. IO-2003-0012; Stipulation of Facts, para. 10.

²⁴ ALLTEL Missouri, Inc., P.S.C. Missouri No. 2.

²⁵ Stipulation of Facts, para. 7 and 12.

Neither MSDT nor Universal provide the following services:²⁶

- (a) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired or speech impaired.
- (b) Access to basic local operator services.
- (c) Access to basic local directory assistance.
- (d) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.
- (e) Equal access in the sense of dialing parity and presubscription among interexchange telecommunications companies for calling within and between local access and transport areas (a.k.a. intraLATA and interLATA presubscription).

The type of service offered by MSDT and Universal is often referred to as "prepaid" service. This term is derived from the fact that in order to receive service, the customer must pay in advance in full for the month of service. In addition, consumers of "prepaid" service usually are limited to basic local services and have no access to toll or fee services. MSDT and Universal's customers are limited in this manner.²⁷

MSDT requires a one time activation fee of \$30.00 and the monthly recurring charge of \$50.00 per month plus applicable taxes and fees.²⁸ Universal requires a one time activation fee of \$40.00 and the monthly recurring charge of \$49.00 per month plus applicable taxes and fees.²⁹ For comparable residential service, ALLTEL charges a monthly recurring charge of \$7.35 or \$7.85, depending on the rate group, plus applicable taxes and fees.³⁰

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

²⁶ *Id.*

²⁷ Missouri State Discount Telephone, P.S.C. No. 1, Original Sheet No. 17; Universal Telecom, Inc., P.S.C. Mo. Tariff No. 1, Original Sheet No. 18.

²⁸ Missouri State Discount Telephone, P.S.C. No. 1, Original Sheet 17.

²⁹ Universal Telecom, Inc., P.S.C. Mo. Tariff No. 1, Original Sheet 18.

³⁰ ALLTEL Missouri, Inc., P.S.C. Missouri No. 2, Section 25, Second Revised Sheet 2.

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ALLTEL is a telecommunications company³¹ and public utility.³² ALLTEL is also an incumbent local exchange telecommunications company³³ and a small local exchange telecommunications company.³⁴ The Commission has jurisdiction over the services, activities, and rates of ALLTEL under Chapters 386 and 392.

The Commission is authorized to "ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price-cap regulation."³⁵ Section 392.245.2 sets out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statute and states, in pertinent part, that:

A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area

An "alternative local exchange telecommunications company" is defined as "a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service . . . in a specific geographic area."³⁶ MSDT was certificated to provide basic local telecommunications service in Case No. TA-2001-334, effective March 26, 2001. Universal Telecom was certificated to provide basic local telecommunications service in Case No. TA-2002-183, effective March 31, 2001. Both MSDT and Universal's tariffs specify that those companies will provide service in ALLTEL's service area.³⁷ MSDT and Universal are alternative local exchange telecommunications companies.³⁸

ALLTEL has provided written notice of its election to be regulated pursuant to the price cap statute on May 17, 2002. Thus ALLTEL has shown all the required elements of Section 392.245.2 except that MSDT and Universal are *providing* basic local telecommunications service. Even though MSDT and Universal provide two-way switched voice service within a local calling scope and provide four of the services listed in Section 386.020(4), they are not providing basic local service in a manner as intended by the legislature that authorizes ALLTEL to elect price-cap regulation under Section 392.245.

Although the Commission has granted both MSDT and Universal certificates of service to provide basic local service in ALLTEL geographic service area, neither

³¹ Section 386.020(51).

³² Section 386.020(42).

³³ Section 386.020(22).

³⁴ Section 386.020(30).

³⁵ Section 392.245.1.

³⁶ Section 386.020(1), RSMo.

³⁷ See, Missouri State Discount Telephone, P.S.C. No. 1, and Universal Telecom, Inc., P.S.C. Mo. Tariff No. 1.

³⁸ Section 386.020(1).

MSDT nor Universal is providing that service in ALLTEL's area in accordance with its certificate. In their applications seeking certification, both MSDT and Universal committed to provide those services required to qualify for state universal service fund support. The orders granting the certificates to MSDT and Universal noted those commitments, and thus MSDT and Universal are required by the terms of their certificates to provide all the essential services as set out in the Commission's rules:

- (6) Essential local telecommunications services. – Two (2)-way switched voice residential service within a local calling scope as determined by the commission, comprised of the following services and their recurring charges:
 - (A) Single line residential service, including Touch-Tone dialing, and any applicable mileage or zone charges;
 - (B) Access to local emergency services including, but not limited to, 911 service established by local authorities;
 - (C) Access to basic local operator services;
 - (D) Access to basic local directory assistance;
 - (E) Standard intercept service;
 - (F) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission (FCC);
 - (G) One (1) standard white pages directory listing; and
 - (H) Toll blocking or toll control for qualifying low-income customers.

When it granted certificates to MSDT and Universal, the Commission was aware that this grant might allow the small ILECs to invoke the price cap statute election. It is for that reason that the Commission demanded that the ALEC offer *all* of the “essential telecommunications services” as defined by the rule. Therefore, the Commission expressly made its grant of service authority to MSDT and Universal in the small ILEC territories subject to the condition that each would offer all the essential telecommunications services for universal service purposes. Because neither MSDT nor Universal is providing all of those services, they are not providing basic local services in accordance with the certificates granted by the Commission. Therefore, those companies do not meet the requirements set out in Section 392.245 as being “certificated to provide basic local telecommunications service and . . . providing such service.”³⁹

ALLTEL argues that the price cap statute⁴⁰ and the definition of basic local services⁴¹ are clear and no interpretation of legislative intent is needed. ALLTEL's position is that the Staff of the Missouri Public Service Commission and the Office of the Public Counsel are “proposing a standard not consistent with the plain reading of the price cap statute and the standard definition of ‘basic local telecom-

³⁹ The Commission will order its Staff, in separate cases, to investigate whether MSDT and Universal are complying with the terms of the orders granting them certificates and to file a recommendation as to whether their certificates should be canceled.

⁴⁰ Section 392.245.2, RSMo.

⁴¹ Section 386.020(4), RSMo.

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munications service”⁴² as found in Section 386.020(4). That statute defines basic local service as being comprised of “any” of a number of services.

In addition, ALLTEL argues that the Commission has previously found the presence of a reseller of basic local services to be sufficient for price cap election for a large ILEC in the *Southwestern Bell* case.⁴³ ALLTEL believes that to find differently for a small ILEC would be discriminatory treatment.

“It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature.”⁴⁴ Section 392.245 contains no reference to competition. The legislature has mandated, however, that every provision in Chapter 392, whether ambiguous or not, be construed with certain principles in mind.⁴⁵ Section 392.185 states:

The provisions of this chapter shall be construed to:

- (1) Promote universally available and widely affordable telecommunications services;
- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

⁴² Initial Brief of ALLTEL Missouri, Inc., filed March 26, 2004, p. 14.

⁴³ *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price-cap regulation Under Section 392.245 RSMo (1996)*, Case No. TO-97-397.

⁴⁴ *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 386-387 (Mo. banc 1987). (citations omitted).

⁴⁵ Section 392.185, RSMo.

The nine provisions of Section 392.185 are mandatory and necessarily must guide the Commission in the construction and application of the price cap statute. Section 392.185(6) states that one public policy to be implemented through the construction of Chapter 392 is to “[a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.” Another is “flexible regulation of competitive telecommunications companies and competitive telecommunications services.”⁴⁶ Price-cap regulation, a transitional status between traditional rate-of-return regulation and deregulated competition, permits ratemaking without the traditional oversight and regulation of the Commission. This is the principal benefit that the legislature intended to confer on qualifying carriers through the price cap statute.

The Commission has examined the price cap statute in the context of the principles set out by the legislature and the entire deregulation scheme put forth in Chapter 392 to implement the federal Telecommunications Act of 1996.⁴⁷ It is clear from the statutes that the legislature intended to promote competition while maintaining protection for the ratepayers by allowing competition to substitute for regulation.

The legislature did not intend the presence of a provider of only a few basic local services to trigger price-cap regulation. When taken in the context of the entire Chapter 392, competition is a necessary element for the change in regulation to a lesser degree of oversight. For instance, in order to receive a certificate to provide basic local services, Section 392.451.1 requires a competitive company to show that it will “offer *all* telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service fund support.”⁴⁸ The Commission has defined these essential services in two of its rules.⁴⁹

The Commission is also supported in this interpretation by the statutory distinction between “providing basic local” and “the resale of basic local” found in the certification statutes.⁵⁰ Those statutes provide the standards for granting a “certificate of local exchange service authority *to provide* basic local telecommunications service *or for the resale* of basic local telecommunications service.”⁵¹

The Commission previously rejected this second argument in the *Southwestern Bell* price cap case.⁵² Southwestern Bell was the first large incumbent local exchange carrier to request price cap status. The *Southwestern Bell* case was appealed to the Circuit Court of Cole County. The Circuit Court affirmed the

⁴⁶ Section 392.185(5).

⁴⁷ 47 U.S.C. §254, et seq.

⁴⁸ (emphasis added).

⁴⁹ 4 CSR 240-31.010(6) and 4 CSR 240-32.100.

⁵⁰ Section 392.450 and 392.451.

⁵¹ Section 392.450. (emphasis added).

⁵² *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price-cap regulation Under Section 392.245 RSMo (1996)*, Case No. TO-97-397.

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Commission's decision to grant price cap status but agreed that "it is a possible interpretation" that resellers can be distinguished from facilities-based providers.⁵³

Furthermore, a distinction on the facts can be made between the current case and the large ILEC cases. The facts of the *Southwestern Bell* case may be distinguished because the alternative carrier in that case was providing different basic local services including equal access to interexchange services. Also, the focus of the findings in that order is on whether effective competition must exist. In this case, the Commission is not finding that "effective competition" must exist before a company becomes price-cap regulated. Instead, the Commission is finding that MSDT and Universal Telecom do not "provide basic local service" as the statute intends and, therefore, ALLTEL does not meet the statutory requirements to be price-cap regulated.

The other large ILEC cases that the Commission has determined can also be distinguished. In the Sprint price cap case,⁵⁴ the alternative carrier was a facilities-based provider. In the only other large ILEC price cap case,⁵⁵ no party alleged that the alternative carrier was not providing service.

MSDT and Universal provide only a few basic local services. MSDT and Universal are not providing all the essential services and minimum service features required in the Commission rules. They do not provide such basic services as access to local operator services, directory assistance, equal access to interexchange carriers, or assistance programs for economically disadvantaged or disabled customers. At rates that are more than five times the cost of similar residential service from ALLTEL and very restricted, the services offered by MSDT and Universal are in no way a substitute or competitive service to ALLTEL's customers.

The Commission concludes that to allow ALLTEL to elect price cap status under these circumstances, where prepaid providers offer such minimal services at such a high cost, "would lead to an illogical result defeating the purpose of the legislature"⁵⁶ and would not be "consistent with the public interest."⁵⁷ The Commission concludes that MSDT and Universal are not providing basic local telecommunications services in a manner that would allow ALLTEL to elect price cap status. The Commission further concludes that ALLTEL's price cap election is invalid, and that ALLTEL maintains its status as a traditional rate-of-return regulated company.

⁵³ *State of Missouri ex rel. Public Counsel v. Public Service Commission, et al.*, Case No. CV197-1795CC, Revised Findings of Fact and Conclusions of Law and Judgment (issued August 6, 1998).

⁵⁴ *In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price-cap regulation Under RSMo Section 392.245 (1996)*, Case No. TO-99-359.

⁵⁵ *In the Matter of the Petition of GTE Midwest Incorporated Regarding Price-cap regulation Under RSMo Section 392.245 (1996)*, Case No. TO-99-294.

⁵⁶ *State ex rel. Maryland Heights Fire Protection Dist.*, *supra*.

⁵⁷ Section 392.185(6), RSMo.

Conclusion

The parties have stipulated to the facts and the only issue for Commission decision is whether the alternative local exchange carriers are providing basic local telecommunication service. The legislature stated that Chapter 392 "shall be construed" so that "full and fair competition . . . [may] substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest."⁵⁸ The types of services that MSDT and Universal provide are not what the legislature intended as basic local services necessary to invoke a lesser degree of regulation for small incumbent local exchange carriers. Furthermore, neither MSDT nor Universal is providing all the services it committed to provide in its application seeking certificates, nor is it complying with the conditions placed on the grant of service authority by the Commission. Therefore, neither is providing the service for which it was granted a basic local certificate. For these reasons, the Commission determines that ALLTEL is not eligible for price cap status and that its price cap election is invalid.

IT IS THEREFORE ORDERED:

1. That ALLTEL Missouri, Inc., is ineligible to elect price cap status.
2. That the Staff of the Commission shall conduct an investigation into the services provided by Missouri State Discount Telephone, and file a report on that investigation together with a recommendation as to whether the certificate should be canceled.
3. That the Staff of the Commission shall conduct an investigation into the services provided by and Universal Telecom, Inc., and file a report on that investigation together with a recommendation as to whether the certificate should be canceled.
4. That any motion not ruled on is denied and that any objection not ruled on is overruled.
5. That this Report and Order shall become effective on October 15, 2004.

Gaw, Ch., Clayton and Appling, CC., concur;
Murray and Davis, CC., dissent with dissenting
opinion attached;
and certify compliance with the provisions of
Section 536.080, RSMo 2000.

**DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY AND
COMMISSIONER JEFF DAVIS**

Although the majority has used a more persuasive legal argument in its Second Report and Order denying ALLTEL's eligibility to elect price cap status, we still find that the plain meaning of the price cap statute (§392.245.2) controls.

⁵⁸ *Id.*

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The majority reasons that neither Missouri State Discount Telephone nor Universal Telecom, Inc. is offering basic local telecommunications services. This conclusion is drawn from the language in the orders granting the certificates to provide basic local service that seemed to condition the certificates upon the provision of all of the services that the Commission has deemed essential to qualify for state universal service fund support, as found in 4 CSR 240-31.010(5).

Both Missouri State Discount and Universal, however, are operating under tariffs approved by this Commission *after* the certificates to provide basic local service were granted. Those tariffs clearly state that certain of the services listed in 4 CSR 240-31.010(5) are not offered. By its approval of the tariffs, the Commission has allowed the companies to offer basic local service consisting of fewer services than the complete list contained in its rule related to the state universal service fund. Therefore, even if the Commission's definition of basic local service were controlling, it is unclear what that definition is. We continue to believe, however, that the definition of basic local telecommunications service *for purposes of the price cap statute* must be the statutory definition of §386.020(4).

Therefore, we dissent from the majority's finding that ALLTEL is ineligible to elect price cap status.

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. Martin Homes, Inc., d/b/a Martin Homes, Respondent.

*Case No. MC-2005-0049
Decided October 5, 2004*

Evidence, Practice and Procedure §33. Martin Homes, Inc., d/b/a Martin Homes failed to timely file an answer to the complaint filed by the Commission's staff. Rather than respond to the complaint, Martin Homes surrendered its Missouri Modular Unit Manufacturer and Dealer Certificates of Registration. The Commission found Martin Homes in default pursuant to 4 CSR 240-2.070(9) and directed the Public Service Commission Director of the Manufactured Housing and Modular Units Program to bring penalty action against Martin Homes in circuit court.

Manufactured Housing §1. Martin Homes, Inc., d/b/a Martin Homes failed to timely file an answer to the complaint filed by the Commission's staff. Staff had alleged that Martin Homes had violated various code provisions and had failed to correct the deficiencies in a reasonable period of time. Rather than respond to the complaint, Martin Homes surrendered its Missouri Modular Unit Manufacturer and Dealer Certificates of Registration. The Commission found Martin Homes in default pursuant to 4 CSR 240-2.070(9) and directed the Public Service Commission Director of the Manufactured Housing and Modular Units Program to bring penalty action against Martin Homes in circuit court.

**ORDER GRANTING DEFAULT AND ACCEPTING SURRENDER OF
CERTIFICATES OF REGISTRATION**

Syllabus: This order finds Martin Homes, Inc., d/b/a Martin Homes, in default.

On August 19, 2004, the Director of the Manufactured Housing and Modular Units Program of the Public Service Commission filed a complaint against Martin Homes, Inc., d/b/a Martin Homes. In that complaint, Staff alleges, *inter alia*, that Martin Homes manufactured and sold a modular unit without proper seals indicating that the unit complied with the code; failed to correct code violations within a reasonable period of time after being ordered to do so in writing by an authorized representative of the Commission; and failed to arrange for proper setup of the Messenger home and failed to correct the deficiencies in a reasonable period of time.

Staff's complaint requests that the Commission suspend or revoke Martin Homes' dealer and manufacturer registrations under Section 700.100.3(9), RSMo Supp. 2003. Staff also requests authority, as provided in Section 700.115.2, RSMo 2000, to bring a penalty action in circuit court against Martin Homes.

On August 24, 2004, the Commission issued a Notice of Complaint that informed Martin Homes of Staff's complaint and directed the company to file an answer within 30 days of the date of the notice. Martin Homes' answer was due no later than September 23, 2004. Martin Homes did not file an answer. However, on or about August 18, 2004, Martin Homes had submitted an undated letter directly to Staff in which Martin Homes stated that it was surrendering its license to manufacture and sell modular housing in Missouri. Staff filed this letter in the

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Commission's Electronic Filing and Information System (EFIS) on August 30, 2004. Staff later filed a copy of its response to Martin Homes' August 18th letter.

Commission Rule 4 CSR 240-2.070(9) provides that if a respondent fails to timely respond to a complaint, the Commission may deem the complaint admitted, and may enter an order granting default.¹ Martin Homes has failed to file a timely response to Staff's complaint. Therefore, Martin Homes is in default and that Staff's allegations are deemed admitted. The Commission will authorize a penalty action against Martin Homes.

In addition, the Commission will acknowledge that Martin Homes has surrendered its Missouri Modular Unit Manufacturer and Dealer Certificates of Registration.

IT IS THEREFORE ORDERED:

1. That default is hereby entered against Respondent, Martin Homes, Inc., d/b/a Martin Homes, and the averments of Staff's complaint are deemed admitted.
2. That the Director of the Manufactured Housing and Modular Units Program is directed to bring a penalty action against Martin Homes, Inc., d/b/a Martin Homes, in circuit court.
3. That the Commission acknowledges that Martin Homes, Inc., d/b/a Martin Homes, has surrendered its Missouri Modular Unit Manufacturer and Dealer Certificates of Registration.
4. That this order shall become effective on October 15, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Ruth, Senior Regulatory Law Judge

¹ That rule also allows the Commission to set aside a default order if the respondent files a motion to set aside the order within seven days of the issue date of the order granting default, and if the Commission finds good cause for the respondent's failure to timely respond to the complaint.

**In the Matter of the Application of Union Electric Company,
Doing Business as AmerenUE, for an Order Authorizing the
Sale, Transfer and Assignment of Certain Assets, Real
Estate, Leased Property, Easements and Contractual Agree-
ments to Central Illinois Public Service Company, Doing
Business as AmerenCIPS, and, in Connection Therewith,
Certain Other Related Transactions.***

*Case No. EO-2004-0108
Decided October 6, 2004*

Electric §14. The Commission concluded that because the “Metro East” transfer involved AmerenUE and its parent and affiliates, the Commission’s affiliate transaction rules necessarily applied and were waived with regard to the pricing portion, but not with regard to the record-keeping portion.

Evidence, Practice and Procedure §6. In cases brought under Section 393.190.1, the Commission concluded that it would determine whether there was a detriment to the public based on a cost/benefit analysis.

Electric §4. Subject to certain conditions, the Commission authorized Union Electric Company, doing business as AmerenUE to transfer its electric and natural gas retail operations in Illinois, including associated system assets, to AmerenCIPS, including normal additions and retirements since December 31, 2003.

Electric §45. The Commission directed that Union Electric Company doing business as AmerenUE make a yearly contribution of \$6,486,378 to the Decommissioning Trust Fund.

APPEARANCES

Joseph H. Raybuck, Thomas M. Byrne, Edward C. Fitzhenry, and David B. Hennen, Attorneys at Law, Ameren Corporation, 1901 Chouteau Avenue, St. Louis, Missouri 63101, for Union Electric Company, doing business as AmerenUE, and

James B. Lowery, Attorney at Law, Smith, Lewis, 111 South Ninth Street, Suite 200, Columbia, Missouri 65205, for Union Electric Company, doing business as AmerenUE.

James M. Fischer, Attorney at Law, Fischer & Dority, 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Intervenor Kansas City Power & Light Company.

Robert C. Johnson, Attorney at Law, 911 Washington Avenue, St. Louis, Missouri 63101, for Intervenor the Missouri Energy Group.

Diana Vuylsteke, Attorney at Law, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102, for Intervenor the Missouri Industrial Energy Consumers.

*On December 30, 2004 the Commission issued an order granting a rehearing in this case. See page 266 for another order in this case.

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John B. Coffman, Public Counsel, and *Douglas E. Micheel*, Senior Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Steven Dottheim, Chief Deputy General Counsel, *Dennis L. Frey*, Senior Counsel, and *Lera L. Shemwell*, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

On August 25, 2003, Union Electric Company, doing business as AmerenUE (UE), filed its Application for Transfer of Assets, Change in Decommissioning Trust Fund, Waiver of Affiliate Transaction Rules, and Motion for Expedited Treatment seeking authority to transfer certain assets and to complete certain other related transactions. UE originally requested that the Commission approve its application "in the first quarter of 2004."

UE seeks leave to transfer to AmerenCIPS, an affiliated regulated utility, all of its Illinois electric utility service area assets, including certificates of convenience and necessity, permits, licenses, and franchises issued by the state of Illinois and various Illinois counties and municipalities, its retail electric business, customers, transmission and distribution plant, and maintenance and labor agreements, as well as related liabilities. Certain electric service assets, including generating assets located in Venice, Illinois, and Keokuk, Iowa, however, will not be transferred. UE also seeks leave to transfer to AmerenCIPS its gas utility service assets located in the Metro East Service Area, including certificates, franchises, permits, and licenses, general plant, customers, agreements, and related liabilities. UE states that none of these assets are located in the state of Missouri and that, consequently, there will be no impact on the tax revenues of any Missouri political subdivision. UE states that the proposed transaction is in the public interest because it will allow it to reallocate to Missouri its generation capacity presently devoted to its Illinois electric service area, thus providing additional generating capacity to serve its Missouri customers.

In connection with the above transfers, UE prays that the Commission will either find that its affiliate transaction rules do not apply to these transactions or else waive them. UE also prays that the Commission will authorize certain changes to its Nuclear Decommissioning Trust Fund to reflect the proposed transactions. UE states that it has also applied for all other necessary regulatory approvals and that it will close the transactions as soon as the necessary approvals have all been granted.

On August 27, the Commission issued its Order and Notice, establishing a deadline for applications to intervene of September 17. The Missouri Energy Group

(MEG)¹ filed its Application to Intervene on September 15, Kansas City Power & Light Company (KCPL)² filed its Application to Intervene on September 16, and the Missouri Industrial Energy Consumers (MIEC)³ filed its Application to Intervene on September 17. All of the applications were timely and unopposed. The Commission granted intervention as requested on October 6.

The parties were unable to agree on a procedural schedule and the Commission, on December 2, adopted the somewhat longer, but still expedited, schedule proposed by Staff and supported by Public Counsel, MEG, and MIEC.

Pursuant to notice as required by statute, an evidentiary hearing was convened at the Commission's offices in Jefferson City, Missouri, on March 25, 2004, and continued on March 26, March 31, April 1, April 2, and April 7, concluding on April 8. During these seven days of hearing, the Commission heard the testimony of 17 witnesses and received 81 exhibits. Much of the testimony, and many of the exhibits, was Highly Confidential and extensive proceedings were had *in camera*.

The parties filed post-hearing briefs and also filed proposed findings of fact and conclusions of law. The case was submitted on June 9, 2004.

Motion for a Preliminary Order:

On October 4, 2004, pursuant to Commission Rule 4 CSR 240-2.150(4), UE moved for the issuance of a preliminary Report and Order and an opportunity to respond. Public Counsel, on October 4, and Staff, on October 5, opposed the request. The Commission is of the opinion that the parties have already provided ample guidance in this matter and that the public interest would not be served thereby. Consequently, the Commission will deny UE's motion.

Issues

Because contested cases before the Commission often do not include issue-framing pleadings, the Commission generally directs the parties in cases pending before it to jointly develop and file a list of issues for determination by the Commission. Shortly before the hearing, the parties must each file a statement of position on each issue. In this way, the contested issues are framed for decision.

In the present case, the parties were unable to develop a joint list of issues and the principal litigants – UE, Staff and the Public Counsel – each submitted a list. Due to the delay occasioned by the parties' inability to agree, the issues lists and the position statements were submitted together. To reproduce the entirety of any

¹ The Missouri Energy Group is an unincorporated association consisting of Barnes-Jewish Hospital, Emerson Electric Company, Holcim, Inc., Lone Star Industries, Inc., River Cement Company, SSM HealthCare, and St. John's Mercy Health Care. Each of these companies purchases substantial amounts of energy from AmerenUE.

² Kansas City Power & Light Company is itself a regulated Missouri utility.

³ The Missouri Industrial Energy Consumers is an unincorporated association consisting of Alcoa Foil Products, Anheuser-Busch Companies, Inc., The Boeing Company, Ford Motor Company, General Motors Corporation, Hussmann Refrigeration, ISP Minerals, Monsanto Company, Pfizer, Precoat Metals, Procter & Gamble Manufacturing, Nestlé Purina, and Solutia. Each of these companies is a large customer of AmerenUE.

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of those documents here would needlessly consume many pages of text. Furthermore, some of the issues and position statements are designated Highly Confidential and cannot be set out here. Therefore, the Commission will briefly summarize the parties' principal contentions. Further details, so far as necessary to understand the Commission's Order, will be set out in the Findings of Fact and Conclusions of Law that follow.

The transaction proposed by UE has been summarized above, on pages 3 and 4 of this Report and Order. UE asserted that, if the proposed transaction were approved, certain benefits would be realized, including the addition of nearly 600 MWs of low-cost, coal-fired, base-load generation to serve UE's Missouri customers. Other benefits include reducing UE to a one-state utility operation, subject at the state level only to this Commission, and no longer subject to the competing requirements of the Illinois Commerce Commission (I.C.C.). If the transaction were not approved, on the other hand, UE warned that it might not have sufficient generating capacity to meet its needs, perhaps as early as the summer of 2004. Finally, UE argued that the governing legal standard requires the Commission to approve the proposed transaction unless it is found that approval will cause a certain, immediate and calculable detriment to the public interest.

The Commission's Staff and the Public Counsel opposed the proposed transaction, contending that it would indeed cause substantial detriments to the public interest and that the benefits asserted by UE are illusory. In particular, Staff and the Public Counsel argued that the generation assets the transfer would make available are neither the best nor the least expensive alternative for providing additional capacity for the future. In addition, they asserted that the transfer would unreasonably expose Missouri ratepayers to the risk of future, "hidden" costs of significant magnitude. Their position is that the governing legal standard does not permit the Commission to approve a transaction of this sort if doing so will expose ratepayers to an unreasonable risk of higher rates in the future.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission has considered the positions and arguments of all of the parties in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider it, but indicates rather that the omitted material was not dispositive.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises."⁴ Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned

⁴ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

to Section 536.090, which applies to “every decision and order in a contested case,” to fill in the gaps of Section 386.420.⁵ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.⁶ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁷

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”⁸ Findings of fact are also inadequate that “provide no insight into how controlling issues were resolved” or that are “completely conclusory.”⁹

With these points in mind, the Commission renders the following Findings of Fact.

The Parties:

UE, the Applicant, is a traditional, vertically-integrated electric and gas utility that presently provides retail electric and gas services to the public in both Missouri and Illinois. As a “vertically-integrated” electric utility, UE is engaged in the generation, transmission and retail distribution of electricity. UE’s Missouri operations are regulated by this Commission and its Illinois operations are regulated by the I.C.C. Various federal agencies, including the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Agency (NRA) also regulate aspects of UE’s operations. UE serves 1.167 million retail electric customers in Missouri and 62,000 in Illinois, and 112,000 retail gas customers in Missouri and 18,000 in

⁵ *State ex rel. Laclede Gas Co. v. PSC of Mo.*, 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *State ex rel. Noranda Aluminum, Inc. v. PSC*, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

⁶ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

⁷ *Id.* (quoting 2 Am.Jur.2d Administrative Law § 455, at 268).

⁸ *State ex rel. Int’l. Telecharge, Inc. v. Mo. Pub. Serv. Comm’n*, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting *State ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

⁹ *State ex rel. Monsanto Co. v. Pub. Serv. Comm’n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *State ex rel. Rice v. Pub. Serv. Comm’n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

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Illinois. UE's Illinois retail electric operations constitute about 6 percent of its total retail electric operations; its Illinois natural gas customers are about 16 percent of its total gas customers. UE's Missouri electric rates are frozen until June 30, 2006, as a result of Case No. EC-2002-1. UE's Missouri natural gas rates are frozen until June 30, 2006, as a result of Case No. GR-2003-0517.

UE is owned by a publicly-traded, registered holding company, Ameren Corporation (Ameren), that is not a regulated utility. Ameren owns other companies in addition to UE, some of which are also regulated utilities, such as AmerenCIPS (CIPS) and AmerenCILCO, operating in Illinois, and some of which are not. Ameren owns Ameren Energy Resources Company that, in turn, owns Ameren Energy Marketing Company (AEM), an unregulated company engaged in the sale of electricity at wholesale, and Ameren Energy Generating Company (AEG or Genco), an unregulated company engaged in the generation of electricity for sale at wholesale. Genco's generating assets, located in Illinois, formerly belonged to CIPS.

Of the intervenors, two – MEG and MIEC – are associations of industrial customers of UE. Their members are listed in Footnotes 1 and 3, above, respectively. They intervened in this matter to protect their interest, which is the continued availability of a safe and adequate supply of electricity at just and reasonable rates. The other intervenor, KCPL, is also a traditional regulated utility providing electricity at retail in Missouri.

The Staff of the Commission traditionally appears as a party in Commission proceedings and is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]"¹⁰

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"¹¹

The Proposed Transaction:

UE seeks leave to transfer its Illinois retail electric and natural gas operations, including customers and the T&D (transmission and distribution) facilities serving them, to its regulated affiliate CIPS at \$138 million net book value. UE's Illinois gas and electric service areas are located just east of St. Louis in an area referred to as "Metro East." The proposed transfer includes UE's certificates, permits, licenses, and franchises, its transmission and distribution plant, its retail electric and natural gas businesses, including its customers, and various associated maintenance and labor agreements and related liabilities. Some of UE's electric service assets in Illinois, however, including generating plants located in Venice, Illinois, and Keokuk, Iowa, are excluded from the proposed transfer. The transfer, if approved and effected, is irreversible for all practical purposes.

¹⁰ Section 386.071.

¹¹ Sections 386.700 and 386.710.

The transfer of UE's Metro East electric service area to CIPS would reduce UE's load requirement by 510 megawatts (MWs) of firm load. By this reduction, 597 MWs of additional capacity would become available for UE's Missouri customers.¹² Because it is not possible to specify that any particular generating plant is serving the Metro East load, that load is considered to use about 6-percent of the output of each of UE's plants, wherever located. Most of UE's generation assets are relatively low-cost, coal-fired, base-load plants, although there are also nuclear, hydroelectric, and natural gas-fired combustion turbine generation (CTGs) assets in UE's fleet, for a total capacity of 8,437 MWs. The proposed transfer, if approved, would make an additional 6-percent slice of the output of each of these plants available to UE's Missouri customers. This 6-percent slice has a book value of \$223 million.

With the availability of an additional 6-percent slice of UE's generation output, an equivalent 6-percent slice of the associated operating costs, administrative costs, and contingent liabilities would necessarily become the responsibility of UE's Missouri ratepayers. The transfer would not affect the capital structure of either UE or CIPS, nor would it affect UE's return on equity or the tax revenues of any political subdivision. The transfer would make UE a Missouri-only utility, no longer subject to the I.C.C.

The compensation for the transfer is structured in this way: CIPS will give UE a promissory note for approximately \$69 million in exchange for half of the Metro East assets. CIPS will make payments, including interest at a market rate, to UE to retire the note. UE will transfer the remaining half of the Metro East assets to its parent, Ameren, as an "in-kind" dividend. UE will then transfer the assets to CIPS as a capital contribution. Ameren has structured the transaction in this way so that CIPS' and UE's capital structures and UE's return on equity will not be significantly affected.

The transfer proposed here has been before this Commission before, in differing configurations, and has been approved. It has not occurred because it has never been approved simultaneously by all three regulating bodies: this Commission, the I.C.C. and the FERC. The record shows that Staff generally favors the transfer, but is opposed to the present configuration. The I.C.C. has approved the electric part of the present proposal and is expected to approve the natural gas part soon. FERC has also approved the transfer.

CIPS:

CIPS is a regulated electric and gas utility that provides services at retail to the public in Illinois. CIPS has approximately 320,000 electric customers and 170,000 gas customers. Because Illinois has deregulated utilities, CIPS is a "pipes and wires" company that owns no generation assets of its own and must purchase electricity to serve its ratepayers. That electricity is provided by AEM, an unregulated UE subsidiary, under a Power Supply Agreement that will expire on December 31, 2006. The electricity sold by AEM to CIPS is produced by Genco, which owns the generating assets that formerly belonged to CIPS and sells electricity, through AEM,

¹² Calculated using a certain reserve figure that is Highly Confidential.

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both to CIPS and on the wholesale market. Genco owns fossil fuel plants with a total capacity of 3,231 MWs and CTGs with a total capacity of 926 MWs.

UE, CIPS, and Genco are operated as a “single control area” under a Joint Dispatch Agreement (JDA) approved by both this Commission and the I.C.C. Under the JDA, capacity – available energy – is dispatched to serve load without regard to whose capacity or whose load is involved. However, inter-company transfers of energy are tracked and billed at incremental cost. “Incremental cost” is a costing methodology that measures only the additional costs incurred to produce the specified increment of service; necessarily, incremental cost excludes all fixed costs. There are no transmission charges applied to such energy transfers under the JDA. Excess capacity is sold off-system at whatever price the market will bear. Under the JDA, profits from such sales are shared on the basis of proportionate native load rather than on the basis of proportionate generation. Under this arrangement, CIPS receives a larger share of the off-system sales profits than it would if the profits were shared on the basis of generation. The proposed transfer, by transferring load from UE to CIPS, would also result in an increase in CIPS’ share of the profits from off-system sales.

Generation-related Issues:

The proposed transfer would make 597 MWs of additional, existing generating capacity available to serve the present and future needs of UE’s Missouri load. UE estimates that the capacity increase provided by the proposed transfer would permit it to avoid new construction that would cost ratepayers about \$7.7 million annually. Ratepayers would realize additional savings because the cost per megawatt-hour (MWh) of the output of UE’s existing plants is significantly lower than the cost per MWh of either purchased power or power produced by gas-fired CTGs.

1. UE’s Need for Additional Capacity:

Public Counsel’s expert economic witness, Ryan Kind, testified that UE does not even need additional capacity at the present. However, Staff’s expert economist, Dr. Michael Proctor, disagreed with Kind and testified that his calculations were “incorrect” and “overstate the capacity surplus of AmerenUE.” The specific figures and calculations produced by the expert witnesses were designated Highly Confidential and cannot be set out here. Nonetheless, a review of the figures produced by Kind shows that they contradict his testimony. Kind calculated a deficit of several hundred MWs per year for each year from 2004 through 2007 if the proposed transfer were not approved, even assuming that AEG transfers to UE some 550 MWs of CTGs at Kinmundy and Pinckneyville.¹³ Proctor testified that UE will need additional capacity by 2006 even if the Metro East transfer is approved. His analysis shows the greatest deficit figures of all, three or more times the level calculated by Kind. All three expert witnesses agree, and the Commission finds, that UE is presently in need of several hundred MWs of additional capacity.¹⁴

¹³ The schedule in question, No. 2 to Kind’s Rebuttal Testimony, is marked Highly Confidential and so the specific figures are not set out here.

¹⁴ The third expert witness referred to was Richard Voytas, Jr.

A finding that UE needs additional capacity is not the same as a finding that it needs the amount of capacity that the Metro East transfer would provide. Economist Kind testified that UE does not need all of the 597 MWs of additional capacity right now. Dr. Proctor also testified that UE could phase new CTGs in over a three-year period, a position that is at odds with his calculation of UE's capacity needs at UE's chosen reserve margin figure. The Commission will return to this point later in conjunction with its discussion of the JDA.

2. UE's Reserve Margin:

The amount of capacity UE needs turns on the size of its capacity reserve margin. The record shows that the Ameren system has enough capacity now to meet its load and maintain a reserve. However, as its load grows, more capacity will be necessary. UE operates with a certain percentage of capacity in excess of that actually needed to meet its load – the specific percentage is Highly Confidential.¹⁵ This reserve margin is necessary because a particular generating plant and its output might unexpectedly become unavailable at any time; thus, a reserve is essential to avoid service interruptions or a forced purchase of power at unfavorable prices. The number of MWs that UE needs necessarily varies with the reserve level selected. Economist Kind testified that UE's chosen reserve percentage is too high and that the cost of the alternative considered by UE, that of building CTGs, would be lower if UE's reserve margin were smaller.¹⁶ However, the record shows that UE's selected reserve margin figure is within the range recommended by the Mid-America Interconnected Network (MAIN). The Commission is of the opinion that it is not sound public policy to urge an electric utility to reduce an otherwise reasonable reserve margin for reasons of economy. The Commission finds UE's reserve margin figure to be reasonable and accepts that it is the appropriate figure to use in resource planning to meet UE's present and future capacity needs. The Commission also notes Dr. Proctor's testimony that Kind's focus on UE's capacity need and reserve margin ignores the energy cost savings that the transfer would bestow on UE's Missouri customers.

3. The Least Cost Alternative Analysis:

UE calculated that the proposed transfer is the "least-cost alternative" by which to provide the necessary additional capacity. UE compared the proposed transfer to a single alternative scenario, in which it would instead immediately build sufficient new CTGs to provide an equivalent amount of additional capacity – these are the source of the avoided construction costs cited by UE as a benefit of the transfer. Public Counsel and Staff criticized UE's least cost analysis for several reasons, one being that it improperly inflated the cost of the CTG option by assuming that all of these units would be built immediately. The Commission will return to this point below in its discussion of the JDA.

¹⁵ More technically, "reserve margin" is the amount of unused and available generation when the system is at peak load, expressed as a percentage of total capacity.

¹⁶ Because less MWs would be needed and fewer CTGs would have to be built.

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UE's least-cost analysis showed that, with respect to providing additional generation capacity, the proposed transfer would save \$2.4 million to \$2.5 million annually over the alternative of constructing CTGs. UE's analyst, Richard Voytas, testified that the Metro East transfer's cost is estimated at \$418.4 million present value (\$43.1 million annually on a levelized annual cost basis) compared to an estimated \$429.4 million present value (\$45.5 million annually on a levelized annual cost basis) for adding 597 MWs of CTGs.¹⁷ Voytas calculated the cost difference between the two options using a test year analysis, which he then projected out over 25 years. Consequently, his analysis did not reflect how the test year values might actually vary over the course of 25 years. For example, one element included in Voytas' calculation was revenue derived from the sale of SO2 emission allowances. The record shows conclusively that the level of revenue Voytas used for the test year could not actually be sustained over 25 years because insufficient allowances are available. For this reason, Staff's witness Proctor suggested that the Commission should delay the transfer and require UE to redo its 25-year analysis as a true multi-year analysis.

Voytas used the 12 months ending December 31, 2002, as his test year. However, he used 2001 figures for revenue from the sale of SO2 emission allowances rather than the 2002 figures because he considered the former to be a more typical year. The 2001 figures were almost twice those of 2002. Kind testified for the Public Counsel that using the 2002 SO2 allowance sales figures would result in a higher revenue requirement for the Metro East transfer option and would reduce its purported benefits by more than half, to an annual figure of only \$1.7 million.

Voytas admitted that he overstated the cost of the CTG option by some \$800,000 by use of a 2-percent annual escalation factor for operations and maintenance (O&M) costs in that option that was not applied in the transfer option. Public Counsel asserted that Voytas also overstated the cost of the CTG option by pricing CTGs at \$471 per kilowatt (kW) where a more reasonable price would be \$450/kW. In fact, Kind testified that making only two adjustments to the analysis, namely, (1) the use of the 2002 SO2 allowance sales revenue figures rather than 2001 figures and (2) pricing CTGs at \$450/kW rather than \$471/kW, shows that the CTG option actually would cost about \$100,000 less than the Metro East transfer option.

First, the Commission generally agrees with UE that Voytas' projection of his test year analysis over 25 years was reasonable given the necessarily highly speculative nature of predictions of how the test year values might change over that period. As UE explained, this position does not ignore the change of values over time but rather assumes that pressures in either direction will cancel out. With respect to the SO2 allowance revenue figures, however, it was clearly incorrect to use the 2001 figures, however typical, where that level of sales cannot be sustained over the 25-year period. For this reason, the Commission accepts Public Counsel's

¹⁷ The estimated cost of the CTG option used here, \$429.4 million present value, includes the \$12.3 million adjustment for likely revenues from off-system sales discussed below, at pages 19-20.

estimate, based on the 2002 sales figures, and finds that the value of the generation-related benefit of the Metro East transfer must be reduced from \$2.4 million to \$1.7 million on an annual basis to reflect the use of the 2002 SO₂ sales revenue figures. The Commission notes that the record does not show what level of SO₂ sales could be sustained over 25 years; Public Counsel's figure is accepted as the correct figure for the test year.

The Commission does not agree with Public Counsel, however, that UE erred by pricing CTGs at \$471/kW. Staff witness Proctor testified that UE's \$471/kW figure was based on the average cost of a mix of larger, less expensive CTGs and smaller, more-flexible-but-more expensive CTGs. The record shows that such a mix of units is required in order to achieve the greatest possible operating flexibility and efficiency and that UE would build such a mix if the proposed transfer is not approved. For this reason, the Commission finds that the \$471/kW figure used by UE was appropriate.

Another area of disagreement involved the degree to which revenues from the sale of excess capacity could be expected to offset the cost of the CTG option. Staff asserted that Voytas used inappropriate assumptions concerning the total margin on sales of excess capacity. Voytas' "mark to market"¹⁸ analysis assumed that the CTGs would operate whenever the incremental cost of CTG generation was below the current spot market price of electricity; but Voytas also assumed that UE would sell only 50-percent of the power so generated, thereby reducing the level of profits from off-system sales available to offset costs. Voytas testified that he made this reduction to address transmission constraints, depth of market, and the use of CTG generation to serve native load. Staff witness Proctor criticized the 50-percent reduction as "arbitrary" and testified that UE should have performed a detailed analysis to determine the actual effect of these three factors on off-system sales revenue rather than simply applying an arbitrary reduction factor unsupported by any empirical data. For example, Proctor testified that if UE actually needs the output of the CTGs to serve native load only 5-percent of the time, then off-system sales should be rated at \$23.3 million in present value rather than \$12.3 million, with the result that the CTG option would cost only \$418.4 million, exactly the cost of the Metro East transfer option as estimated by Voytas.

Voytas, however, testified that Proctor's 5-percent figure was unreasonable because it assumed that virtually all of the output of the CTGs would be available for sale off-system over a 25-year period. In 2003, Voytas testified, UE used 49.4-percent of the output of its newest CTGs at Peno Creek to serve native load. Voytas further testified that UE's Asset Mix Optimization (AMO) studies showed that between 35-percent to 80-percent of the output of the CTGs would be available for off-system sales, depending on the scenario. Voytas testified that the 50-percent reduction figure he used was therefore a "reasonable and prudent" choice in the middle of the range predicted by the AMO studies. Based on UE's actual experience with the Peno Creek CTGs and the results of UE's AMO studies, the Commission

¹⁸ A "mark to market" analysis compares forward electric price curves to the variable cost of operating the CTGs for every hour of the analysis period.

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finds that the 50-percent figure used by Voytas was not arbitrary and was a reasonable estimate of the output likely to be available for off-system sales. Therefore, the Commission finds that the appropriate estimated revenue level for off system sales under the CTG option is \$12.3 million.

The Commission agrees with Public Counsel that it is appropriate to reduce the cost of the CTG option by the amount of expected off-system sales revenue, thereby reducing the cost from \$441.7 million to \$429.4 million, only about \$11 million higher than the present value cost of the Metro East transfer option at \$418.4 million. Proctor characterized this \$11 million difference between the two options as "extremely small," given the scale of the figures involved, so that, "from a purely economic perspective, the expected costs of the two alternatives are almost identical."

Both Kind and Proctor testified that not all of the 597 MWs of additional capacity that the transfer would provide are needed immediately by UE. In that case, the excess production should be available for sale and the proceeds should be deducted from the cost of the Metro East transfer option just as the expected off-system sales proceeds are deducted from the cost of the CTG option. However, any excess capacity released by the Metro East transfer would not be available for sale due to the JDA and the Power Supply Agreement referred to above. Under those agreements, the excess capacity produced by the Metro East transfer would be used to meet CIPS' native load, including the Metro East load transferred away by UE.

4. RFPs and the Joppa Plant:

Kind testified that Voytas' Least Cost Analysis was improper because it compared the cost of the Metro East transfer option to only a single alternative. Kind suggested that UE should have used RFPs – Requests For Proposals – to identify other possible options. Kind also testified that UE had ignored the approximately 400 MWs received annually from a particularly efficient – and thus low-cost – coal-fired plant at Joppa, Illinois, owned by EEInc. Ameren owns a controlling interest in EEInc. and, according to Kind, should therefore be able to dictate that those 400 MWs remain available.

Both the Commission's Staff and UE joined in the view, which the Commission accepts, that RFPs are not appropriate for long-term resource planning. Dr. Proctor testified that the appropriate way to meet long-term capacity needs is to build a new plant. RFPs, by contrast, are a way to obtain short-term power supplies.

The Joppa Plant presents a different issue. UE owns 40-percent of EEInc. and receives 40-percent of the Joppa Plant's output under a contract that will expire at the end of December 2005. UE offered testimony that that contract will not be renewed because it is unprofitable for EEInc. to sell that power to UE at the price mandated by this Commission's Affiliate Transaction Rules, a price that is below market price. UE's share of EEInc. is an investment owned by UE's shareholders and UE has an obligation to maximize the return on that investment. The record shows that EEInc. no longer bids on UE's RFPs.

The Commission finds that the record shows that the output of the Joppa Plant will not be available after the end of 2005. Whether it *should* be available is a different

question, one that is outside the scope of this case. Proctor disagreed with Kind regarding the EEInc. contract. Proctor testified that, in UE's long-range resource plan, the termination of the EEInc. contract is linked not to the Metro East transfer, but rather to the addition of 330 MWs of CTGs at Venice, Illinois. The Venice CTGs will replace a coal-fired plant at that location that UE retired. Proctor specifically disagreed with Kind's conclusion that the capacity freed by the transfer would be unnecessary if the EEInc. contract were renewed and stated that renewal of that contract would permit UE to delay the addition of new capacity by only a year. Proctor stated that renewal of the EEInc. contract should not be a condition for approval of the Metro East transfer.

The Commission finds Proctor's testimony on this point to be more credible than Kind's. The record shows that the Joppa output will not be available after the end of 2005 and that UE is replacing that capacity with CTGs at Venice. Thus, as Proctor testified, the proposed Metro East transfer is unrelated to the Joppa contract. A simple count of the MWs involved supports Proctor's conclusion that UE would soon need additional capacity even if the Joppa contract were renewed.

5. The Joint Dispatch Agreement:

As has been stated above, UE and CIPS are operated as a single control area under a JDA. The JDA provides that profits from off-system sales are distributed to the participants on the basis of comparative load rather than comparative generation. This arrangement favors CIPS rather than UE because CIPS has a large load and no generation. The transfer of the Metro East load from UE to CIPS will exacerbate this inequity. Although UE doesn't believe the JDA needs to be modified in this respect, UE has stated that it will obtain a modification of the JDA to distribute profits from off-system sales based on generation rather than load if necessary to gain approval of this transfer. This amendment would provide financial benefits to UE of at least \$7 million annually, and perhaps as much as \$24 million annually.

The JDA also provides for the transfer of energy between the participating entities at incremental cost. As noted above, the effect of the JDA and the Power Supply Agreement in the event that the Metro East transfer is carried out would be to require that any power produced by UE that is not needed to meet its load would be available to CIPS at incremental cost to meet its load requirements. In other words, the Metro East ratepayers would continue to be served by the same 6-percent slice of UE's generation that serves them now, but they would no longer pay any portion of the fixed costs of that generation. At present, the Metro East ratepayers pay approximately 6-percent of UE's generation-related fixed costs. Fixed costs are those that do not vary with the amount of production.

Transmission-related Issues:

The proposed transfer includes certain transmission assets owned by UE, constituting 14.33-percent of all of UE's transmission plant. These facilities connect the generating plants at Venice, Illinois (75 MWs, soon to be increased by 330 MWs to 405 MWs), Pinckneyville, Illinois (330 MWs), Joppa, Illinois (405 MWs), and Keokuk, Iowa (12 MWs), to the Missouri grid. These transmission assets

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presently serve UE's Missouri customers and will continue to be necessary to serve UE's Missouri customers. If the proposed transfer is approved, title to these transmission assets will be transferred to CIPS.

UE performed an analysis of the financial impact on Missouri ratepayers of the transfer of the Metro East transmission assets. That analysis showed that the transfer would confer a net annual benefit on Missouri ratepayers of \$0.385 million, increasing to \$1.503 million after movement to MISO due to the reduction of transmission revenues by 25-percent. Proctor testified that UE made certain errors in its analysis that caused it to significantly understate the net annual benefit of the transfer to Missouri ratepayers. Specifically, Proctor stated that UE had failed to include the further allocation between its Missouri retail customers and its wholesale customers, an error that resulted in an overstatement of the transmission cost of service for Missouri retail customers of about \$1.4 million. Proctor also stated that UE made an additional rounding error that resulted in the understatement of the benefits of the transfer by \$271,000 annually. Finally, Proctor stated that using the traditional 12-coincident-peak allocation factor rather than the 4-coincident-peak allocation factor adopted by UE for its analysis results in additional benefits of \$100,000 to \$200,000 annually. Proctor concluded that the net annual benefit of the transfer would actually be \$2.033 million, increasing to \$3.089 million after movement to MISO. No party contested Proctor's conclusions and the Commission accepts Dr. Proctor's figures.

Under the JDA, as noted previously, UE and CIPS are operated as a single control area. The transmission assets in question play a fundamental role in the single control area architecture because they are the conduit over which power is exchanged by UE and CIPS. The purpose of a control area is to dispatch and regulate generation. Every control area is connected at various points with adjacent control areas; these points of interchange are metered on a real-time basis. This metering provides instantaneous information to the control area operator so that generation output can be regulated to maintain balance with native load and net scheduled interchange, that is, net imports or exports of power.

Because of the single control area operating design, there are now no transmission charges for power transferred between UE and AEG/CIPS. However, Staff fears that CIPS may seek to recoup lost revenues by imposing such transmission charges if the JDA is modified as has been suggested in this proceeding. Staff witness Proctor described a "worst-case scenario" in which Missouri ratepayers would have to pay \$13.8 million annually to access the generation from Venice, Pinckneyville, Joppa, and Keokuk over CIPS' transmission facilities. The Commission notes that Proctor himself rated the worst-case scenario as only 20-percent to 25-percent likely to occur. If it did occur, the impact would be an additional \$0.80 per UE customer per year. UE has transferred functional control of these transmission assets to the MISO via its relationship with GridAmerica.¹⁹

¹⁹ Approved by this Commission in Case No. EO-2003-0271.

Issues Related to the Decommissioning Trust Fund:

One of UE's generating stations, in Callaway County, Missouri, is a nuclear reactor. A large sum, some \$515,339,000 in 2002 dollars, will eventually be needed to decommission that plant at the end of its useful life. UE's electric customers, including the 62,000 retail electric customers in the Metro East area, contribute toward that amount through the rates that they pay. The collected amounts are held in the Callaway Decommissioning Trust Fund, which presently has an estimated after-tax market value of \$191,220,140.59.

The Commission redetermines the eventual cost of decommissioning, and the necessary contribution of the ratepayers to meet that cost, every three years in a proceeding referred to as the triennial review. The estimated cost of decommissioning is allocated to UE's three jurisdictions using 12-month coincident peak demand allocation factors. The three jurisdictions are Missouri Retail, Illinois Retail and Wholesale; Missouri Retail is allocated responsibility for 91.27-percent of the estimated cost of decommissioning. The start of the next triennial review, on September 1, 2005, was about 15 months away at the time of hearing in April 2004. Decommissioning costs, according to UE's 10-K filed with the SEC, will increase by 3.5-percent annually through 2033. The Commission's estimate of total decommissioning costs has increased at each triennial review.

If the Metro East transfer is approved, there will only be two jurisdictions, Missouri Retail and Wholesale. The allocation factor applicable to Missouri Retail will increase to 98.01-percent and Missouri ratepayers will become responsible for approximately \$22.0 million in decommissioning costs that are presently the responsibility of the Illinois Retail ratepayers in the Metro East area.²⁰ As an offset to this amount, UE will transfer 98-percent – \$13.8 million in after tax value – of the funds in the Illinois subaccount of the Decommissioning Trust Fund to the Missouri subaccount. Decommissioning costs will be allocated 98-percent to Missouri Retail and 2-percent to Wholesale, which is how the energy will be used after the transfer. Decommissioning costs were reallocated in this manner when UE sold its Iowa retail electric service area in 1992 and Missouri ratepayers became responsible for the portion of the decommissioning costs that had been the responsibility of UE's Iowa ratepayers.

Until the next triennial review, UE would contribute \$6,214,184 annually to the Decommissioning Trust Fund as established by this Commission at the last triennial review. This amount, equal to 0.37-percent of UE's annual Missouri operating expenses, excludes the \$272,554 collected annually for this purpose from the Metro East ratepayers in Illinois. UE has offered a "Zone of Reasonableness" analysis that suggests that there is no need for the \$272,554 contribution at decommissioning inflation rates up to 3.854-percent; in other words, that the annual contribution of \$6.2 million will result in adequate funding even if that target is inflated annually by the designated percentage. UE's witness Kevin Redhage

²⁰ Calculated as follows: \$536,000,000 (total decommissioning cost in 2003 dollars) x 0.9801 (Missouri share after the transfer) - \$536,000,000 x 0.9127 (Missouri share before the transfer) = \$36,126,000 - \$13,526,000 (current market value of the Illinois sub-account) = \$22,600,000.

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testified that the present decommissioning inflation rate is 3.472-percent, calculated using three weighted factors (labor, 65-percent; energy, 13-percent; and burial cost, 22-percent). Nonetheless, UE has offered to make that contribution itself until the next triennial review if it is necessary to obtain approval of the proposed transfer.

Costs and Liabilities:

Both Staff and the Public Counsel argued that the proposed transfer would be detrimental to the interests of Missouri ratepayers because of the treatment of certain costs and liabilities under the agreement between UE and CIPS. These include items arising prior to the transfer, such as debt on the property transferred to Illinois, workers compensation and other employee-related claims, personal injury claims, products liabilities, common general liabilities, under-reserved claims, and environmental liabilities. Many of these categories include items both known and unknown. Another consideration is items arising after the transfer, such as capital investments necessary in the future to comply with increasingly stringent environmental regulations. With respect to the items arising pre-transfer, Staff and Public Counsel contend that the UE's proposal will not leave CIPS with its fair share of the known items and will release the Metro East ratepayers from their fair share of the unknown items. With respect to future capital costs made necessary by environmental regulations, Staff and Public Counsel contend that UE's least cost analysis is seriously flawed because it does not include the likely rate impact of these costs. The net impact of the transfer will be to increase the existing exposure of Missouri's ratepayers on these liabilities by 6-percent.

1. Pre-transfer Costs and Liabilities:

The agreement between UE and CIPS provides for the transfer of certain liabilities to CIPS. These include (i) balance sheet liabilities relating to UE's Illinois retail operations; (ii) trade payables relating to UE's Illinois retail operations; (iii) liabilities and obligations on contracts relating to UE's Illinois retail operations, insofar as they arise after the closing date of the transfer; (iv) litigation-related liabilities relating to UE's Illinois retail operations, insofar as they arise after the closing date of the transfer; (v) environmental liabilities relating to UE's Illinois retail operations, insofar as they arise after the closing date of the transfer, specifically including (1) the Alton Manufactured Gas site and (2) any pre-closing environmental liabilities relating to UE's Illinois retail operations insofar as they are covered by UE's existing environmental adjustment clause riders approved by the I.C.C.; (vi) accounts payable on natural gas purchased for resale and not yet paid; (vii) accrued payroll and employee vacation liability; (viii) liabilities relating to customers of UE's Illinois retail operations, whether arising pre-closing or post-closing; and (ix) franchise fees, gross receipts taxes and utility taxes relating to UE's Illinois retail operations, whether arising pre-closing or post-closing.

The agreement provides that any liabilities not expressly noted as transferring to CIPS will remain with UE, including (i) all pre-closing liabilities relating to UE's Illinois retail operations; (ii) all employee liabilities relating to UE's Illinois retail operations, whenever asserted, arising prior to closing, including workers compensation, wage and hour, and the like; (iii) liabilities due to litigation relating to UE's

Illinois retail operations, whether pending at closing or filed after closing but based on pre-closing events; (iv) products liabilities, safety liabilities and environmental liabilities based in whole or in part on pre-closing events or conditions, including claims over services, personal injury, property damage, environmental claims, hazardous materials, employee health and safety, and violation of applicable laws; (v) taxes, except as expressly assumed by CIPS; and (vi) all liabilities relating to assets retained by UE, including generation-related environmental liabilities.

The agreement between UE and CIPS provides that almost all of the existing general corporate liabilities will stay with UE. "General corporate liabilities" are those which cannot be assigned directly to a particular line of business. There are 22 liability accounts on UE's balance sheet and the record shows how each balance sheet account will be treated if the transfer occurs. The Unrecovered Purchased Gas Costs account is not affected by the transfer and will stay with UE. Reserves for existing lawsuits, asbestos claims, and worker's compensation claims will stay with UE. These amounts have already been expensed. Environmental liabilities with a reserve on the books will stay with UE, except for the Alton Manufactured Gas Site, which will be transferred to CIPS. The Asset Retirement Obligation Liability account, which is offset by a balance sheet asset, will stay with UE, as will the corresponding asset. These accounts will have no cost of service impact going forward.

Accounts Payable will stay with UE, but these amounts are already expensed and will thus have no impact on rates. Invoices from MRT for natural gas used in Illinois will transfer to CIPS. The latter amounts have never been included in Missouri's cost of service. Charges owed to Ameren Services (AMS) will move to CIPS post-closing. These amounts have already been expensed and will have no impact on rates. Illinois customer deposits will transfer to CIPS, as will Illinois customer advances in aid of construction.

Interest on long-term debt will stay with UE; there is no cost of service impact because the interest is "below the line." Short-term debt will also stay with UE. The interest expense is "below the line" and thus excluded from cost of service. Also, short-term debt is not included in calculating UE's return on equity. The Dividends Declared account will stay with UE. This item is also "below the line" and will have no cost of service impact. Taxes applicable to the transferred assets will be transferred to CIPS. Taxes collected by UE from its employees and customers will be paid over to the various taxing authorities. A proportionate amount of Accumulated Deferred Income Taxes will be transferred to CIPS.

Liability for Employee Wages Payable for transferred employees will transfer to CIPS. Accrued vacation liability for transferred employees will transfer to CIPS. Other items in the Miscellaneous Current and Accrued Liabilities account will stay with UE, but have already been expensed. Pre-closing pension liability will not be transferred. Post-closing pension liability for transferred employees will transfer to CIPS. Current pension liability has already been expensed. Current liabilities for Post Retirement Benefits have already been collected in rates and will stay with UE.

Post-closing liabilities will transfer to CIPS. Derivative Instrument Liability under FAS 133 is not applicable to the businesses being transferred, and so will

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stay with UE. Accumulated Nuclear Decommissioning will not be transferred. The Other Regulatory Liabilities account is the other side of the FAS 109 balance sheet entry. It is offset by entries in the Accumulated Deferred Income Taxes account already mentioned. A proportionate amount of this account is being transferred to CIPS. It has no cost of service impact. A proportionate amount of Accumulated Deferred Investment Tax Credits is being transferred to CIPS, as is a proportionate amount of the Accumulated Deferred Income Taxes Accelerated Amortization Property, the Accumulated Deferred Income Taxes Other Property, and the Accumulated Deferred Income Taxes Other accounts.

Staff contends that the compensation that UE would receive under the agreement is thus inadequate, because it represents only the net book value of the transferred assets and includes nothing additional for the retained liabilities. The record shows that the assets being transferred are security for certain bonds that UE will retain. Missouri ratepayers, therefore, will be responsible for paying the debt on the assets being transferred.

UE will retain all pre-transfer environmental liabilities except for the Alton Manufactured Gas Plant and any other such liabilities covered by UE's existing riders. UE dismisses these liabilities as "speculative" because their eventual magnitude cannot now be known. Staff asserts that Missouri ratepayers should not pay for the 6-percent of the environmental liabilities that arose when that share of the generation benefited Illinois ratepayers. Staff argues that 6-percent of these liabilities should either stay with Illinois or that UE should be adequately compensated for assuming them. Some 49 lawsuits regarding injuries due to asbestos exposure at UE premises have already been filed, seeking a total of \$2,450,000 in damages outside of legal fees and costs. UE will retain these liabilities under the transfer agreement. When CIPS and CILCO transferred generation assets to Genco and AERG, they agreed to indemnify them for any pre-transfer, asbestos-related claims. The agreement between UE and CIPS does not include any such indemnity clause. With respect to the asbestos claims, the record shows that, while 49 are pending, UE has obtained dismissal of 50 and has settled 22 more. UE has established a reserve of \$30 million for such claims and the potential exposure of Missouri ratepayers if the transfer is approved is 6-percent of any shortfall.

UE must fund the cleanup of hazardous waste sites regardless of fault. One such site is the former Sauget Generating Station in Illinois. While UE's estimated share of the Sauget remediation costs is proprietary and cannot be set out here, the likely impact on Missouri ratepayers is less than \$1 million. However, the other company liable for the Sauget cleanup, Solutia – formerly known as Monsanto – is in bankruptcy and may not be able to pay its share of the Sauget remediation costs. UE's 10-K suggests that the Sauget costs could be as much as \$26 million if Solutia makes no contribution. The impact of that amount on Missouri ratepayers would be \$1.56 million by 2010.

The agreement between UE and CIPS specifically transfers all liability for remediation at the Alton Manufactured Gas Plant to CIPS. The I.C.C. allows utilities to recover remediation costs in rates from Illinois ratepayers and that remediation is in rates in the Metro East service area. The current amount deferred for UE, net of recoveries, is \$1 million.

2. Future Environmental-related Capital Costs:

One criticism that Public Counsel made of Voytas' least cost analysis was that his projection of test year values over 25 years inappropriately assumed that the cost of complying with environmental regulations would not change over that period. UE's own 10-K, a form filed with the S.E.C., however, projects environment-related capital investments of \$863 million to \$1,163 million over the next 15 years, an additional 6-percent of which will become the responsibility of Missouri ratepayers if the Metro East transfer is approved. Assuming a 10-percent Return on Equity (ROE), these capital investments will cost ratepayers between \$5.1 million and \$7.0 million annually due to the increased rate base on which UE would be earning a return. Although the figures in the 10-K are estimates, the Missouri Supreme Court has said that the PSC should use estimates where actual figures are unavailable.²¹ These projected expenditures are not speculative; they are likely enough that UE included them in its 10-K for consideration by investors.

The proposed transfer will make available for UE's Missouri customers an additional 6-percent slice UE's existing generating capacity. Necessarily, with this extra capacity will come responsibility for an additional 6-percent of any associated future environmental liabilities. As noted above, Public Counsel calculated this additional burden at between \$5.1 million and \$7 million annually. For this reason, Kind testified that these coal-fired plants are not "low-cost" plants, as UE claims, but increasingly high-cost plants as increased environmental regulation takes hold in the near future.

An associated matter has to do with SO₂ emission allowances, already discussed above. SO₂ is a pollutant released into the air by burning coal. The allowances, each of which authorizes the release of one ton of pollutants, are necessary for utilities with coal-fired plants. The Environmental Protection Agency allocates a number of allowances to each utility each year. UE aggressively markets its SO₂ allowances to other utilities, leading Staff and Public Counsel to fear that UE will find itself without the necessary number of allowances. In that case, the company would have to install expensive pollution-control equipment at its plants sooner than would otherwise be necessary and, should the Metro East transfer be approved, Missouri ratepayers would have to pay an additional 6-percent of the costs of such a debacle. Staff's witness, Campbell, testified that the costs of emission-control systems would run into the hundreds of millions of dollars.

The record shows that UE has one of the largest SO₂ allowance banks in the country. If environmental regulations don't change and UE makes no further sales, it has enough allowances on hand now to last through 2033. UE was allotted 1.6 million Phase I allowances and it has sold only 474,829, which is less than half of the total. The forecasts in UE's 10-K are possible levels of future capital expenditures for environmental purposes. It is by no means certain that these expenditures will ever actually be made. In any event, UE's Missouri ratepayers will

²¹ *St. ex rel. Martigney Creek Sewer Co. v. Public Service Commission*, 537 S.W.2d 388, 396 (Mo. banc 1976).

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certainly bear the costs of over 90-percent of such expenditures as are actually made. What is at issue is an additional 6-percent share, or an annual increase of \$6.54 to each UE customer if the capital expenditures are actually as high as Public Counsel predicts, at a 10-percent ROE.

Natural Gas Issues:

Staff witness Dave Sommerer suggested that there are two detriments with respect to the proposed transfer of the Alton natural gas retail service area. First, that the small Fisk/Lutesville service area in Missouri might then be unable to obtain transportation on as good terms as it has heretofore enjoyed. Specifically, the Missouri Fisk/Lutesville customers will lose the benefit of including their supply contracts in the much larger Alton gas supply contracts. Second, that gas-related costs at the Venice and Meramec power plants might increase due to the loss of a beneficial "piggybacking" relationship with the Alton natural gas service area. The Alton and Fisk/Lutesville Local Distribution Companies (LDCs) are served by a single firm transportation contract that will expire on Oct. 31, 2006. At that time, AEFS – another Ameren subsidiary – will negotiate a new contract, which UE's witness Massman testified will probably be just as good. Sommerer, however, testified that, if the transfer is approved, the power plants will replace firm, no-notice contracts for peak summer demand with uncertain, stand-alone supply and transportation arrangements relying on the volatile spot market. Massman insisted that the gas supply to the Venice and Meramec plants would not become either less certain or more costly because of the proposed transfer. The plants' needs were always subordinate to those of the Alton LDC. The plants were charged the market price for transportation and can thus still obtain it at that price; the plants used the arrangement rarely; Alton allocated the highest-priced gas to the plants each month; and the plants can still obtain storage from the transporter just as Alton did.

Dave Sommerer testified for Staff that the "worst-case scenario" impact for Fisk/Lutesville would be a \$10,000 annual cost increase, equating to a \$0.50 per month increase for the average customer. UE's witness, Massman, testified that neither asserted detriment is plausible in his opinion. Massman testified that the impact of the worst-case scenario with respect to the Venice and Meramec power plants would be an *annual* increase of \$0.084 to the electric bill of UE's average Missouri customer. Based on the record, the Commission finds that the asserted detriments are not likely to occur. If they do occur, their impact would be minimal. Sommerer testified that the worst-case outcomes might occur, while Massman, who actually manages these matters for UE, insisted that they were unlikely. The Commission finds Massman's testimony to be the more credible. The record shows, and the Commission finds, that the financial impact of even the worst-case scenarios would be very small.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The record shows that UE is in the business of owning, operating, controlling, and managing electric plant and natural gas plant for the purpose of selling electricity and natural gas to others. UE is therefore both an electric corporation and a gas corporation as defined in Section 386.020, and is a public utility as defined in that section, subject to regulation by this Commission under Chapters 386 and 393, RSMo.

UE proposes to sell to its affiliate, CIPS, its retail natural gas and electric operations in Illinois, including the customers and the transmission and distribution facilities that serve them. None of the property is located in Missouri, but some of it, particularly certain electric transmission facilities, directly serve UE's Missouri customers by transmitting electricity to them from UE's Illinois and Iowa power plants. Some of the other assets, such as the natural gas LDC in Alton, Illinois, indirectly impact UE's Missouri gas and electric operations. The effect of the transaction will be to reduce UE's native load, thereby making a larger percentage of the output of its existing power plants available to serve its remaining customers, all of whom will be located in Missouri.

Section 393.190.1 provides, in pertinent part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public * * * without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. * * * Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

The cited statute does not make any distinction as to the location of the property in question, whether in Missouri or elsewhere. Rather, it makes a distinction that turns on whether or not the property in question is "necessary or useful" to the utility in the performance of its duties to the public. The record shows that all of the property in question is "necessary and useful" to UE in serving its natural gas and electric retail customers. Therefore, the Missouri Public Service Commission finds that it has jurisdiction over the proposed transfer pursuant to Section 393.190.1.

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The Affiliate Transaction Rule:

UE seeks a waiver of the Commission's electric and gas affiliate transaction rules, 4 CSR 240-20.015 and 4 CSR 250-40.015, to the extent necessary to authorize the Metro East transfer. However, UE contends that a waiver is not necessary in the circumstances presented by this case because the transfer is not within the scope of those rules. The rules are designed to protect ratepayers from a transaction that is not at arms-length and which may thus result in exorbitant prices being imposed on ratepayers.²²

Staff and OPC contend that it is not in the best interests of UE's regulated customers to acquire power plants with pre-existing environmental liabilities. And, for this reason, they argue that the proposed compensation is not prudent, adequate, nor reasonable. They assert that this is exactly the sort of transaction to which the affiliate transaction rules were meant to apply. They argue that the present transaction is within the affiliate transaction rules because it involves the regulated entity (UE), its unregulated parent (Ameren) and a regulated affiliate (CIPS).

The Commission has authority to "inquire as to, and prescribe the apportionment of, capital, earnings, debts and expenses" between the regulated entity and its parent and affiliates.²³ In utility regulation, "the dominant thought and purpose of the policy is the protection of the public while the protection given the utility is merely incidental."²⁴ The purpose of the affiliate transaction rules is to prevent cross-subsidization, in which a conglomerate including a regulated entity seeks to shift the costs of its unregulated activities to its regulated customers. The Commission agrees with Staff and Public Counsel that the affiliate transaction rules necessarily apply to the Metro East transfer, involving as it does UE, its parent and its affiliates.

UE seeks a waiver of Commission Rules 4 CSR 240-20.015 and 4 CSR 250-40.015. UE points out that, under 015(10)(A) (the two rules are identical in this respect), there are two ways to obtain a waiver, and only the second of these – (10)(A)2 – includes the "best interests of the regulated customers" standard cited by Staff and Public Counsel. The first way – (10)(A)1 – simply requires a written application to the Commission. The Commission agrees that UE has correctly analyzed the regulations and its Application constitutes the required written application. The Commission may grant the written application for good cause shown. In the present case, "good cause" would be a finding that the proposed transfer will confer a net benefit.

The Governing Standard under Section 393.190.1:

Section 393.190.1 does not contain a standard to guide the Commission in the exercise of its discretion; that standard is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he reason the

²² *Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753 (Mo. banc 2003).

²³ Section 393.140(12).

²⁴ *De Paul Hosp. School of Nursing, Inc. v. Southwestern Bell Telephone Co.*, 539 S.W.2d 542, 548 (Mo. App., W.D. 1976).

proposed sale of the assets is not detrimental to the public interest.”²⁵ A court has said of Section 393.190.1, that “[t]he obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility.”²⁶ To that end, the Commission has previously considered such factors as the applicant’s experience in the utility industry; the applicant’s history of service difficulties; the applicant’s general financial health and ability to absorb the proposed transaction; and the applicant’s ability to operate the assets safely and efficiently.²⁷ None of these factors are at issue in the present case; neither is UE’s ability to continue to provide adequate service to its customers.

The parties do not agree on the interpretation or application of the “not detrimental to the public” standard. UE asserts that the Commission must grant approval unless it finds the transfer would be detrimental to the public interest.²⁸ UE emphasizes the opinion of one court, quoted above, that the purpose of the statute is to ensure the continuation of adequate service to the public.²⁹ UE quotes prior decisions of this Commission to the effect that denial requires compelling evidence on the record that a public detriment is likely to occur.³⁰ According to UE, while the Applicant has the burden of proof, those asserting a specific detriment have the burden of proof as to that allegation.³¹ Finally, UE notes that the Applicant is not required to show that the transfer is beneficial to the public.³²

Staff points out that this is the Commission’s first contested case under Section 393.190.1 since *AG Processing*, a decision in which the Missouri Supreme Court reversed a Commission decision under that section.³³ That case held, Staff asserts, that the Commission must evaluate both the present and future impacts of a transfer at the time it makes its decision. Staff further contends that, while the “not detrimental” standard applies to the transfer itself, UE seeks some additional relief that is governed by other, higher standards. For example, Staff argues that UE seeks several ratemaking determinations that are subject to the “just and reasonable” standard and that UE seeks a waiver from the Commission’s affiliate transaction rules governed by the “best interests of the regulated customers” standard.

²⁵ Commission Rule 4 CSR 240-2.060(7)(D).

²⁶ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

²⁷ See *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220.

²⁸ *St. ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. banc 1934).

²⁹ *Fee Fee Trunk Sewer*, supra.

³⁰ *In the Matter of KCP&L*, Case No. EM-2001-464 (*Order Approving Stipulation & Agreement and Closing Case*, issued Aug. 2, 2001).

³¹ *Anchor Centre Partners, Ltd. v. Mercantile Bank, NA*, 803 S.W.2d 23, 30 (Mo. banc 1991); *In the Matter of Gateway Pipeline Co., Inc.*, Case No. GM-2001-585 (*Report & Order*, issued Oct. 9, 2001).

³² *In the Matter of Sho-Me Power Corp.*, Case No. EO-93-259 (*Report & Order*, issued Sep. 17, 1993).

³³ *AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732 (Mo. banc 2003).

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Public Counsel, in turn, agrees that Section 393.190.1 requires prior Commission authority for a utility to transfer any part of its system or assets; such authority is to be granted only where the proposed transfer is “not detrimental to the public interest.”³⁴ The applicant utility bears the burden of proof and, contrary to UE’s notion, this burden does not shift. Public Counsel urges the Commission to ignore UE’s quotations of erroneous language from past Commission orders that approval must be granted unless “compelling” evidence shows that a “direct and present” detriment is “likely” to occur. Instead, as recently articulated by the Missouri Supreme Court in *AG Processing*, and restated by the Commission itself,³⁵ “a detriment to the public interest includes a risk of harm to ratepayers.” Thus, Public Counsel takes the position that the mere risk itself of higher rates in the future is a detriment to the public. Public Counsel insists that the law requires that the Commission deny the proposed transaction even if the detriments found are the result of events that would simply be set into motion or which involve the probability of significant harm which could likely occur, but is not certain to occur.

In the *AG Processing* case, the Commission approved an acquisition and merger by Aquila, Inc. – then called UtiliCorp – that involved an acquisition premium of \$92,000,000.³⁶ Although the Commission rejected Aquila’s proposed regulatory plan, under which a portion of the acquisition premium would be recovered in rates, the Commission refused to consider the recoupment of the acquisition premium on the grounds that it was a rate case issue. The Missouri Supreme Court reversed, saying:

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC’s refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp’s being allowed to recoup the acquisition premium.³⁷

³⁴ *City of St. Louis, supra*.

³⁵ *In the Matter of Aquila, Inc.*, Case No. EF-2003-0465 (*Report & Order*, issued Feb. 24, 2004) pp. 6-7, *In the Matter of Aquila, Inc.*, Case No. EF-2003-0465 (*Report & Order*, issued Feb. 24, 2004) pp. 6-7,

³⁶ An acquisition premium is the amount by which the purchase price exceeds the book value of the assets purchased.

³⁷ *AG Processing, supra*, 120 S.W.3d at 736 (internal footnotes omitted).

The Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing*, but rather restated the existing “not detrimental to the public” standard. In particular, the Court clarified the analytical use of the standard. What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. The *AG Processing* decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. Approval should be based upon a finding of no net detriment. Likewise, contrary to UE’s position, the *AG Processing* decision does not allow the Commission to defer issues with ratemaking impact to the next rate case. Such issues are not irrelevant or moot because UE is under a temporary rate freeze; the effects of the transfer will still exist when the rate freeze ends.

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission’s ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.

In cases brought under Section 393.190.1 and the Commission’s implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.

Resolution of Contested Issues:

The Commission has determined that it must resolve the contested issues set out below in order to determine whether or not the proposed transfer would have a net detrimental effect on the public interest.

1. Generation-related Issues:

The Commission has found that UE needs additional capacity, both now and in the future, and that the additional energy made available by the transfer would be cheaper, on a per-MWh basis, than either purchased power or power generated by CTGs. Underlying these findings is the Commission’s finding that the reserve margin figure selected by UE is reasonable and appropriate. UE calculated the generation-related savings at \$2.4 million annually. These points weigh in favor of the proposed transfer.

Public Counsel and Staff claim that the proposed transfer would be detrimental to the public interest if it is not, in fact, the least cost alternative. The Commission is, of course, concerned that necessary additional capacity be added at no greater cost to ratepayers than necessary. However, the Commission’s greater concern in this case is that it not be a vehicle whereby the Ameren group shifts costs to

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Missouri ratepayers in order to maximize its revenues from its unregulated activities.

The Commission agrees with UE and Staff that the appropriate alternative with which to compare the proposed transfer is the option of building CTGs. The Commission has found that RFPs are inappropriate in long-term resource planning and that the output of the Joppa Plant will not be available after the end of 2005. The Commission has also found that the generation-related savings realized from the transfer must be reduced from \$2.4 million, as calculated by UE, to \$1.7 million annually in order to remove the inappropriate level of revenue from the sale of SO₂ emission allowances. The Commission has further found that the level of generation-related benefits must be further reduced by \$0.8 million in order to remove the effect of the escalation factor that Mr. Voytas admittedly applied only to the CTG option. Thus, the Commission finds that the level of generation-related savings conferred by the Metro East transfer would be \$0.9 million annually. This level of difference between the two options is, as Dr. Proctor testified, so “thin” as to make them essentially identical in economic terms.³⁸

With respect to the JDA, Staff urges two amendments as conditions of the approval of the proposed transfer. The first of these, the sharing of the profits of off-system sales based on comparative generation rather than comparative load, UE is willing to accept. The record shows that that amendment will yield about \$7.0 million annually to UE. This figure is an additional benefit that the transfer would confer.

The second recommended JDA amendment has to do with the pricing of inter-company energy transfers. Currently, such transfers are accounted for at incremental cost. Staff recommends that they be accounted for at market price instead. UE is not willing to accept this amendment, characterizing it as a complex matter requiring further study. UE is willing, however, to “study alternatives” in cooperation with Staff.

The record shows that, under the JDA and the related Power Supply Agreement that bind UE, CIPS and Genco into a single control area, the Metro East load transferred from UE to CIPS must still be served by whatever power supplies are available to UE and Genco through the end of 2006. Therefore, of the 597 MWs of additional capacity made available by the Metro East transfer, any portion not needed by UE to serve its native load will be available to serve CIPS’ native load, including UE’s former Metro East ratepayers. If CIPS needs any of this power, it cannot be sold off-system at market price. Instead, CIPS will pay only incremental cost for any power generated by UE that it uses. UE’s fixed costs, however, will be the sole responsibility of UE’s Missouri customers after the transfer, with no contribution from CIPS or from the Metro East ratepayers.

³⁸ Proctor was speaking of the \$2.4 million figure. Presumably, these considerations are all the more pertinent to the lower figure of \$0.9 million.

The record does not show whether or not CIPS and Genco have sufficient capacity to absorb the transferred Metro East load without substantial power input from UE.³⁹ Because UE has the burden of proof, this failure of proof requires a finding that substantial input from UE would be required. The Commission finds that the sale of power by UE to CIPS to serve the transferred Metro East load at incremental cost, with no contribution to fixed costs, would be detrimental to the interests of UE's Missouri customers. An additional detriment is the value of the lost off-system sales revenue for the power used by CIPS, less the value of the incremental costs actually paid by CIPS.⁴⁰

If the JDA is not amended, then the transfer will indeed result in shifting costs to Missouri ratepayers in order to benefit the Ameren group as a whole. The Commission cannot permit that result to occur. However, the JDA amendments recommended by Staff would resolve that concern.

2. Transmission-related Issues:

Staff asserts that the transfer should not be approved because UE's Missouri ratepayers might someday be required to pay transmission costs in order to receive the power generated at UE's Illinois and Iowa power plants. Dr. Proctor described a "worst-case scenario" that would cost Missouri ratepayers \$13.8 million annually. While the record suggests that this outcome is not likely, the Commission must nonetheless consider it.

UE's analysis of the revenue requirement impact of the transfer in the transmission area revealed a substantial monetary benefit for Missouri ratepayers. Staff's own expert on this topic, Dr. Proctor, filed an affidavit stating that UE had understated the level of this monetary benefit. Proctor calculated the net annual benefit of the transfer at \$2.033 million, increasing to \$3.089 million after movement to MISO.

3. Issues Related to the Decommissioning Trust Fund:

UE seeks leave to reduce its decommissioning contribution by \$272,554, the amount collected annually from its Metro East ratepayers. Staff and Public Counsel oppose this proposal and contend that permitting UE to stop making this portion of its annual Decommissioning Trust Fund contribution would harm Missouri ratepayers. The Commission agrees with Staff and Public Counsel.

As a matter of simple common sense, any dollars not contributed now are dollars that will not be available when decommissioning starts in 2024. While the Commission does not reject UE's "Zone of Reasonableness" analysis, it recognizes that that analysis is merely a forecast of the result of the complex interactions of numerous factors over many years. However artfully devised and implemented, the forecast may prove to be wrong. It is reasonable, therefore, to require UE to

³⁹ Dr. Proctor testified, "Under the current JDA, the excess base-load capacity gained from the transfer must be used to serve the load that was transferred rather than be available for spot market sales. Moreover, the excess base-load generation that would have otherwise been available to sell into the wholesale spot market is committed to serve the AmerenCIPS load at AmerenUE's incremental cost." Ex. 14:10.

⁴⁰ The likely value of this detriment was never quantified in the record.

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continue to contribute the portion of the decommissioning cost allocated to the Metro East ratepayers until the next triennial review establishes a new contribution level based on changed circumstances and a new forecast.

In connection with this point, UE explains that the Commission has required it to establish and maintain the Decommissioning Trust Fund in a manner that takes the maximum advantage of the provisions of the Internal Revenue Code in order to reduce the amount of the fund lost to federal taxes so far as is possible. UE asserts that, if the Commission requires UE to increase the amount of its Missouri-jurisdictional contribution by \$272,554 annually, it will not be able to continue to make tax-deductible contributions to the fund under existing rulings by the Internal Revenue Service. It will have to seek new rulings. In order for UE to obtain these rulings, the Commission will have to find that the new contribution amount of \$6,486,738 is included in UE's Missouri-jurisdictional cost-of-service for ratemaking purposes. Further, UE states that the Commission will also have to find that the new contribution amount was established based on the economic and financial input parameters used in the "Zone of Reasonableness" analysis attached as Schedule 4 to Redhage's Surrebuttal Testimony. UE points to Regulation 26 C.F.R. Section 1.468A-3(g):

(g) Requirement Of Determination By Public Utility Commission Of Decommissioning Costs To Be Included In Cost Of Service. The Internal Revenue Service shall not provide a taxpayer with a schedule of ruling amounts for any nuclear decommissioning fund unless a public utility commission that establishes or approves rates for electric energy generated by the nuclear power plant to which the nuclear decommissioning fund relates has—

(1) Determined the amount of decommissioning costs of such nuclear power plant to be included in the taxpayer's cost of service for ratemaking purposes; and

(2) Disclosed the after-tax return and any other assumptions and determinations used in establishing or approving such amount for any taxable year beginning on or after January 1, 1987.

The language of the cited regulation is clear. The Commission will make the requested findings. The Commission finds that UE's new Missouri jurisdictional Decommissioning Trust Fund annual contribution amount of \$6,486,378, is included in UE's Missouri-jurisdictional cost-of-service for ratemaking purposes and is established based on the economic and financial input parameters used in the "Zone of Reasonableness" analysis attached as Schedule 4 to Kevin Redhage's Surrebuttal Testimony.

If UE continues to contribute the Metro East share of the decommissioning expense until September 1, 2005, the Commission considers the Decommissioning Trust Fund issues to be neither detrimental nor beneficial to the public interest.

4. Costs and Liabilities:

This category includes costs and liabilities, both known and unknown, arising from events occurring prior to the transfer and also costs that may be incurred for future capital improvements required by environmental regulations. The scope of the latter is not now certain, but estimates of some of these amounts exist in UE's 10-K filed with the S.E.C.

The Commission considers it inequitable, and thus detrimental, to transfer to Missouri ratepayers all of the share of UE's pre-closing costs and liabilities now borne by the Metro East ratepayers. Most of these liabilities are not presently known and it is thus not possible for the Commission to weigh them against the benefits that the transfer will produce. However, the "worst case scenario" for the Sauget remediation alone is a significant amount. Likewise, any pre-closing environmental liabilities that become apparent only after the transfer has occurred are also likely to be significant amounts. The Commission is of the opinion that an appropriate condition must be imposed on the transfer in order to protect Missouri ratepayers from these unknown but potentially significant costs.

If the proposed transaction is approved, UE's Missouri customers will become responsible for an additional 6-percent slice of any costs relating to capital improvements at UE's power plants necessary to meet changing environmental regulations. As already discussed, the Metro East ratepayers would continue to be served by that generation, free of any responsibility for these costs. Based on figures in UE's 10-K filed with the S.E.C., the potential annual impact of the additional share of costs relating to such capital improvements is estimated at \$5.1 million to \$7.0 million annually.

5. Natural Gas Issues:

These issues are purely factual. Staff presented testimony suggesting that the natural gas aspects of the proposed transaction may result in certain detrimental impacts on UE's Missouri gas and electric operations. The record shows that the asserted detrimental impacts are not likely to occur. The record further shows that, if they do occur, their impact would be \$0.01 million for the Fisk/Lutesville LDC and \$0.98 million for the power plants.

Cost-benefit Analysis:

A cost-benefit analysis compares costs to benefits to determine whether a net cost or a net benefit is likely to result. The costs and benefits identified in this proceeding are set out below:

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Description	Benefits	Detriments
Generation-related savings	\$ 0.900 million	--
JDA amendment to share profits by generation	\$ 7.000 million	--
Transmission-related savings	\$ 2.033 - 3.089 million	--
Decommissioning Trust Fund issues	--	--
JDA requirement that surplus UE power be available to CIPS at incremental cost	--	?
Possible transmission charges	--	\$ 13.800 million
Sauget remediation	--	\$ 1.560 million
Future environmental capital investments	--	\$ 5.100 - 7.000 million
Natural gas: possible Fisk/Lutesville impact	--	\$ 0.010 million
Natural gas: possible power plant impact	--	\$ 0.098 million
TOTALS:	\$ 9.933 - 10.989 million	\$20.568 - 22.468 million
DIFFERENCE:		\$ 9.579 - 12.535 million

A comparison of the benefits of the proposed transfer, conservatively calculated, to the possible negative impacts reveals that, if the transfer's certain benefits are realized at what has been characterized as the lowest possible level, and all of the potential negative impacts do actually occur, the public interest will sustain a detriment on the order of \$9.5 million to \$12.5 million dollars annually.

However, this is not the end of the analysis. The benefits itemized above are certain, while the detriments, for the most part, are not. UE expects that the benefits will actually be much greater than the level shown above, and the record shows that this expectation is not unreasonable. For example, UE expects that the JDA amendment it has offered will more likely yield \$24.0 million annually than \$7.0 million. Additionally, load-growth and high natural gas prices will both magnify the level of the benefits. Both of these conditions are so likely as to be nearly certain. However, prudence requires that the Commission consider the benefits at a conservative level and the detriments at the "worst-case scenario" level. Finally, as discussed below, the Commission can impose conditions on the transfer that will mitigate the detriments.

Necessary Conditions:

The Commission has authority to impose conditions on a proposed asset transfer in order to ensure that the transfer does not have detrimental effects. The Commission's Staff proposed a number of conditions.

1. Ratemaking Treatment:

Staff advised the Commission, as is its practice in asset transfer cases, to state that no ratemaking treatment is intended. The Commission will continue its usual practice, with such exceptions as are noted below.

2. The JDA:

Staff recommended that the Commission require amendment of the JDA (1) to distribute profits from off-system sales on the basis of generation rather than load and (2) to price inter-company energy transfers at market price rather than at incremental cost. Staff further recommended that the Commission require UE to terminate the JDA if these amendments cannot be obtained.

Termination of the JDA would expose Missouri ratepayers to transmission charges on power generated at UE's Illinois and Iowa power plants. This was Staff's primary concern with respect to the transfer of the transmission facilities. The Commission will not include any condition requiring termination of the JDA.

UE has offered to make the first amendment to the JDA that Staff recommended and the Commission will require that condition. UE has not agreed to make the second JDA amendment recommended by Staff, but has committed to doing an analysis of inter-company energy transfer pricing with a view to possibly modifying the JDA in the future. However, the record shows, and the Commission has found, that the transfer would be detrimental to the public in the absence of this amendment. Specifically, it would permit the Ameren group to shift costs to Missouri ratepayers for the benefit of Ameren's unregulated activities. Therefore, the Commission will require the second amendment to the JDA recommended by Staff as a condition of its approval of the transfer.

3. Costs and Liabilities:

Staff recommended a number of conditions relating to liabilities and costs, which are summarized here. Staff notes that these liabilities and costs fall into two categories, those directly assigned to the Illinois ratepayers and those allocated between Illinois and Missouri. Staff recommends that costs and liabilities directly relating to UE's Illinois operations shall transfer to CIPS, whether arising pre-transfer or post-transfer. As to allocated costs and liabilities, Staff recommends that amounts allocated to UE's Illinois retail operations shall either transfer to CIPS or be separately tracked by UE in its books and records until either the amount that would have been allocated to Illinois is reduced to zero or UE can demonstrate savings due to the transfer that exceed those amounts. Staff further recommends that UE forego recovery of 8% of pre-closing generation-related liabilities, including litigation costs, employee-related items, product liabilities, and environmental-related capital costs and liabilities. Staff also recommends that UE be responsible for post-closing generation-related costs and liabilities, but shall be required to use its "best efforts to maximize contributions to offset these costs and liabilities from entities other than AmerenUE that receive the benefit of the power from these generation assets." Finally, Staff recommends that UE shall forego recovery of all pre-closing natural gas-related costs and liabilities.

The Commission is of the opinion that pre-closing liabilities that are directly assignable to UE's Illinois retail operations, or to the transferred assets, must

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transfer to CIPS as a condition of the Commission's approval of the transfer. This includes any debt on the transferred assets and pre-closing natural gas costs. Otherwise, the transfer would be detrimental to the public interest. To the extent that UE retains any such liabilities, contrary to the opinion of the Commission, such amounts shall be excluded from rates in the future.

With respect to allocated liabilities, the record shows that the proposed transfer would expose Missouri ratepayers to a risk of increased costs related to environmental and other pre-closing liabilities. Specifically, the increased risk is that Missouri ratepayers will have to pay the 6-percent share of such potential liabilities now borne by the Metro East ratepayers. Most of these liabilities are presently unknown and it is not possible, consequently, to accurately assess this risk. In the absence of proof on this point, the Commission must assume that the risk is substantial. The record reveals that, when CIPS and CILCO transferred generation assets to Genco and AERG, they agreed to indemnify them for any pre-transfer, asbestos-related claims. UE's agreement with CIPS does not contain any such indemnity clause and UE has refused to agree to hold harmless its Missouri ratepayers with respect to the additional 6-percent share of this risk that the transfer will bestow on them. The Commission is of the opinion that some such protective mechanism is necessary if the transfer is to occur. For that reason, the Commission will exclude 6-percent of any such liabilities arising from pre-closing events and conditions from UE's rates as a condition of its approval of the transfer. In addition to unknown environmental and other liabilities, this includes general corporate liabilities and pre-closing natural gas costs not directly assignable to UE's Illinois retail operations.

One pre-closing environmental liability is known, namely, the Sauget remediation. If the proposed transfer did not occur, the Metro East ratepayers would be responsible for 6-percent of the Sauget remediation costs. The Commission is of the opinion that the transfer of this liability to UE's Missouri ratepayers would be detrimental to the public interest. Therefore, as a condition of its approval of the transfer, the Commission will exclude from rates 6-percent of any costs incurred by UE in the Sauget remediation.

The remaining category of liabilities concerns future capital investments required to meet increasingly stringent environmental standards. The Company is due a return of and on its capital investments dedicated to the public service and those amounts are collected from ratepayers in rates. These are generation-related costs and the generation resources will stay with UE; however, if the transfer did not occur, the Metro East ratepayers would be responsible for 6-percent of these costs. Staff's suggested condition was that UE use its "best efforts to maximize contributions to offset these costs and liabilities from entities other than AmerenUE that receive the benefit of the power from these generation assets." The Commission is of the opinion that the condition recommended by Staff on this point is unnecessary because the benefits of the proposed transfer outweigh these potential costs, even if realized at the level feared by Public Counsel. They may not be realized at that level. The Commission notes that potential prospective environmental liabilities of this sort are an inevitable *quid pro quo* of the use of relatively low-cost, coal-based generation.

4. SO2 Allowances:

The Commission has already adjusted the level of generation-related benefits to reflect the fact that the record shows that UE included a level of revenue from SO2 emission allowances sales that cannot be sustained over 25 years.

The Commission agrees with UE that the SO2 allowance bank management issue has no place in this case because it is not a matter directly related to the proposed transfer. Its relevance is the exposure of Missouri ratepayers to an additional 6-percent slice of any such costs as may actually occur. These costs, in fact, are included among the environmental liabilities discussed above. For this reason, the Commission is of the opinion that the further condition recommended by Staff on this point is unnecessary. If events ever do occur that call into question UE's prudence in managing its allowance bank, the Commission will take appropriate action at that time.

5. Identification of Assets:

This issue was settled by the parties.

6. Natural Gas Issues:

Staff recommends that UE be required to renegotiate the Fisk/Lutesville, Alton and other Illinois gas transportation contracts as a package. Further, Staff recommends that Fisk/Lutesville pay rates no higher than Alton pays. Additionally, Staff recommends that UE hold harmless its electric customers from any change in costs due to the loss of the beneficial arrangement of its Illinois power plants and the Alton LDC.

The Commission is of the opinion that the conditions recommended by Staff on this point are unnecessary because the benefits of the transfer outweigh the potential detriment, even if Staff's "worst-case scenario" should occur. The record suggests that the potential detriments identified by Staff are not likely to occur and would have minimal impact if they did.

7. Affiliate Transaction Rules:

Staff recommends that the Commission limit the waiver of the affiliate transaction rules to the pricing portion of the rules only and that the record-keeping portion of the rules should not be waived.

The Commission will not waive the record-keeping portion of the affiliate transaction rules.

8. The Nuclear Decommissioning Trust Fund:

UE has offered to contribute the \$272,554 now collected from the Metro East ratepayers until the next triennial review. This offer is essentially equivalent to Staff's recommended condition on this point. The Commission will require the contribution offered by UE and will make the findings requested by UE to support the desired tax treatment of that contribution.

9. Transmission:

Staff recommends that the transfer be delayed until UE has done a study showing that there would be no detrimental impact on operations or revenue

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requirement. Staff further recommends that UE hold harmless its Missouri retail customers from any detrimental impact. Staff also recommends that UE forego recovery of any increased transmission costs solely due to the transfer. Staff also recommends that UE shall ensure that 405 MWs are available to replace the 405MWs now obtained from EEInc.'s Joppa plant. Finally, Staff recommends that the Commission open a case to investigate Ameren's decision to not make 405 MWs available from EEInc.'s Joppa plant after December 31, 2005.

The Commission notes that UE has done the analysis requested by Staff. Therefore, that recommendation is no longer an issue.

The Commission does not need UE to agree to hold Missouri ratepayers harmless or to agree to forego recovery of increased transmission costs. In order to protect Missouri ratepayers from the risk of increased transmission costs resulting solely from the Metro East transfer, the Commission will exclude any such costs from UE's rates in the future as a condition of its approval of the transfer. The Commission agrees with UE that the record shows that such increased costs are unlikely. Dr. Proctor, who testified as to these possible costs, rated them as only 20-percent to 25-percent likely. Nonetheless, the level of these costs is such that additional protection for Missouri ratepayers is necessary.

The Commission considers the recommended conditions relating to the Joppa plant to be unnecessary. The record shows that the power received under the contract with EEInc. will be replaced by new capacity at the Venice plant. The Commission further considers that the record contains satisfactory explanations for the end of that contract.

10. Access to Books, Records, Employees, and Officers:

Staff recommends that UE, Ameren, and UE's affiliates be required to make these available and to waive any claim that they are not available under PUHCA or because they are not in UE's possession or control.

The Commission is of the opinion that this condition is unnecessary because it has not waived the record-keeping requirements of the affiliate transaction rules.

The purpose of these conditions is to protect ratepayers by mitigating or avoiding the possible detriments. Set out below is an amended cost-benefit analysis reflecting the conditions adopted by the Commission. The figures changed by the above-conditions are in bold. The difference is now shown in the Benefits column because, with the conditions adopted by the Commission, the benefits of the transfer will outweigh the possible detriments.

Description	Benefits	Detriments
Generation-related savings	\$ 0.900 million	--
JDA amendment to share profits by generation	\$ 7.000 million	--
Transmission-related savings	\$ 2.033 - 3.089 million	--
Decommissioning Trust Fund issues	--	--
JDA requirement that surplus UE power be available to CIPS at incremental cost	--	\$ 0
Possible transmission charges	--	\$ 0
Sauget remediation	--	\$ 0
Future environmental capital investments	--	\$ 5.100 - 7.000 million
Natural gas: possible Fisk/Lutesville impact	--	\$ 0.010 million
Natural gas: possible power plant impact	--	\$ 0.098 million
TOTALS:	\$ 9.933 - 10.989 million	\$ 5.928 - 7.828 million
DIFFERENCE:	\$ 2.105 - 5.061 million	

Conclusion:

Based on its review of the Application, the testimony and exhibits adduced at the hearing, and the briefs, memoranda and arguments of the parties, and with the imposition of the conditions listed above, the Commission concludes that the proposed transfer is not detrimental to the public interest and should be approved. The Commission expressly notes that, in the absence of these conditions, the transfer would cause a substantial detriment to the public interest such that it could not be approved.

IT IS THEREFORE ORDERED:

1. That the Motion for Issuance of a Preliminary Order, filed by Union Electric Company, doing business as AmerenUE, on October 4, 2004, is denied.
2. That the Application filed on August 25, 2003, by Union Electric Company, doing business as AmerenUE, is approved, subject to the conditions herein set out. Union Electric Company, doing business as AmerenUE, is hereby authorized to transfer its electric and natural gas retail operations in Illinois, including associated system assets, to AmerenCIPS, including normal additions and retirements since December 31, 2003; and is further authorized to perform in accordance with its Asset Transfer Agreement with AmerenCIPS. The parties are further authorized to take such other lawful actions as may be reasonably necessary to consummate the transaction herein authorized.
3. That the Commission hereby waives the pricing portion, but not the record keeping requirements, of Commission Rules 4 CSR 240-20.015 and 4 CSR 250-40.015, pertaining to

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Affiliate Transactions, with respect to the Application approved in Ordered Paragraph 2, above.

4. That Union Electric Company, doing business as AmerenUE, shall amend its Joint Dispatch Agreement as discussed above as a condition of the approval herein contained. These amendments shall accomplish both of the modifications to the Joint Dispatch Agreement recommended by Staff in this proceeding.

5. That Union Electric Company, doing business as AmerenUE, shall annually contribute \$6,486,378 to the Decommissioning Trust Fund with respect to its Missouri-jurisdictional operations pending the further order of this Commission. This amount is included in Union Electric Company, doing business as AmerenUE's Missouri-jurisdictional cost-of-service for ratemaking purposes and is established based on the economic and financial input parameters used in the "Zone of Reasonableness" analysis attached as Schedule 4 to Exhibit 2 received in this proceeding. Union Electric Company, doing business as AmerenUE, shall transfer 98-percent of the contents of the Illinois Retail Subaccount to the Missouri Retail Subaccount.

6. That Union Electric Company, doing business as AmerenUE, as a condition of the approval herein contained, shall not recover in rates any amount relating to any pre-closing liability directly assignable to the Illinois electric and gas retail businesses the transfer of which is hereby approved; nor any amount relating to any pre-closing liability directly assignable to any of the assets or facilities included in the transfer herein approved; nor 6-percent of any allocable amount relating to pre-closing liabilities presently unknown, including environmental, products liability, tort, employee-related, and other such liabilities; nor 6-percent of any allocable costs relating to any general corporate liabilities not transferred in part to AmerenCIPS as part of this transaction; nor 16 percent of any allocable pre-closing natural gas costs; nor 6-percent of any allocable costs UE incurs in remediation activities at the site of the former Sauget Generating Station, to the extent that the costs in question would not have been incurred had the transfer herein approved not occurred.

7. That Union Electric Company, doing business as AmerenUE, as a condition of the approval herein contained, shall not recover in rates any portion of any increased costs due solely to transmission charges for the use of the transmission facilities herein transferred to AmerenCIPS to the extent that the costs in question would not have been incurred had the facilities not been transferred.

8. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions or expenditures herein involved, except as is expressly stated to the contrary. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

9. That the three Stipulations and Agreements submitted by the parties during the course of this proceeding, relating to charges by AMS (Ex. 33), the 13.8kV switchgear at the Venice generating plant (Ex. 60), and the Asset Transfer List (Ex. 67), are hereby approved. The parties are directed to comply with the terms of these agreements.

10. That Union Electric Company, doing business as AmerenUE, shall file a pleading in this case within ten (10) days of the consummation of the transfer herein authorized, so advising the Commission.

11. That Staff's Motion for Leave to File the Affidavit of Dr. Proctor, filed on April 27, 2004, its Motion for Leave to Late-file its Initial Brief, filed on May 18, 2004, and its Motion for Leave to Late-file its Table of Contents and Conclusions to its Initial Brief, filed on May 19, 2004, are granted. All other pending and unruléd motions are denied.

12. That this Report and Order shall become effective on October 16, 2004.

13. That this case may be closed on October 17, 2004.

Gaw, Ch., Clayton, and Appling, CC., concur;
Murray, C., concurs, with separate concurring
opinion attached;
Davis, C., concurs, with separate concurring
opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

I write separately because I neither agree with the majority on the imposition of three conditions, nor with the majority's application of the cost-benefit analysis. I do, however, concur in the approval of the transfer.

First, with respect to the Commission's Affiliate Transaction Rules, the majority has lost sight of the fact that this is a transaction between two regulated utilities. This is not the sort of transaction, consequently, that the Affiliate Transaction Rules are intended to cover. Those rules, as the Missouri Supreme Court explained, are designed to prevent a conglomerate from subsidizing its unregulated activities by shifting costs to its regulated operations, where recovery of those costs from ratepayers is more certain. *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753 (Mo. banc 2003). That is not the case here. CIPS, like UE, is a regulated utility. For that reason, the rules do not apply in my view, and the transfer should not be conditioned upon the application of any of the requirements of 4 CSR 240-20.015 and 4 CSR 250-40.015.

Second, the majority has also ignored UE's "Zone of Reasonableness" analysis that shows convincingly that the contribution that was to be made by the Metro East ratepayers to the decommissioning Trust Fund is not needed. Although UE has offered to do so, I believe it is pointless to require the shareholders to make an entirely unnecessary contribution. The estimate of decommissioning costs will be recalculated for the next triennial review, which will start in less than one year from today. At that time, contribution levels will be adjusted to meet the new estimate. I believe that the majority should rely on UE's calculation and not require the contribution in question.

Third, the majority attempts to insulate Missouri ratepayers from the extremely speculative and unlikely result of increased transmission costs for use of the transferred transmission assets by making a ratemaking determination. The legality of that determination, outside of a general rate case, is doubtful. See *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41, 57 (Mo. banc 1979) (ratemaking decisions must be based upon a consideration of all relevant factors). More important, however, is the difficulty of administering the majority decision. Just how are any increased costs resulting solely from the transfer to be recognized? This condition simply guarantees continuous needless litigation in the future over amounts sought to be excluded from rates.

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Additionally, the cost-benefit analysis employed here included every conceivable detriment that could possibly occur as a result of the transfer. Highly speculative or unlikely detriments should not be weighed in the equation. Nevertheless, the transfer results in a net benefit, even though the potential detriments are over-weighted in the analysis. Therefore, there is no question that the transfer should be approved.

**In the Matter of the Application of Aquila Inc., for an Accounting
Authority Order Concerning Fuel Purchases.**

*Case No. EU-2005-0041
Decided October 7, 2004*

Accounting §42. The Commission summarily denied Aquila, Inc.'s request for an Accounting Authority Order concerning rising fuel costs because such costs were addressed in a Stipulation and Agreement previously entered into by Aquila.

**DETERMINATION ON THE PLEADINGS AND
ORDER DENYING APPLICATION**

Syllabus: This Order summarily denies Aquila, Inc.'s, application for an Accounting Authority Order to record fuel and purchased power as an asset rather than as an expense.

Background

In a separate matter,¹ on April 13, 2004, the Missouri Public Service Commission issued an Order approving a Stipulation and Agreement, resolving Aquila, Inc.'s last rate case. Included in the agreement was a provision for an Interim Energy Charge (IEC). The IEC resolved "the fuel and purchased power expense issues in [the rate case]." The parties agreed that the IEC would be in place for two years, from April, 2004, until April, 2006.

Aquila's Missouri jurisdictional operations are divided between its Missouri Public Service (MPS) operations and its Light and Power (L&P) operations. The Agreement allowed Aquila to include, in its permanent rate base for MPS customers, a charge of 1.6654 ¢/kWh. The agreement further allowed Aquila to include a variable amount, subject to true-up and refund, of .3057 ¢/kWh. The total of these two charges is 1.9711 ¢/kWh. If during the IEC period Aquila's average cost for fuel and purchased power exceeds 1.9712 ¢/kWh, then Aquila will not be required to refund its customers. If the cost is below the permanent charge of 1.6654 ¢/kWh, then Aquila will be required to refund all of the variable amount of .3057 ¢/kWh. Although with different numbers, the same provisions apply to Aquila's L&P operations.

On August 4, 2004, Aquila filed an Application for Accounting Authority Order, which is the subject of this order. Aquila states that since April, 2004, it has under collected \$5.7 million and wants to record fuel costs, to the extent that they exceed Aquila's recoveries under the IEC, as an asset rather than expense. In support of

¹ *In the Matter of the Request of Aquila, Inc., d/b/a Aquila Networks – L&P and Aquila Networks-MPS, to Implement a General Rate Increase in Electric Rates*, Commission Case No. ER-2004-0034.

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its application, Aquila states that the IEC agreement does not address how Aquila should record under collections, and that extraordinary fuel costs justify an Accounting Authority Order.

After the Commission granted its application to intervene, Sedalia Industrial Energy Users' Association (SIEUA), a party to the rate-case agreement, filed a motion to dismiss Aquila's application. SIEUA stated that Aquila's application is an attempt to change the terms of the agreement reached in the rate case. The Office of the Public Counsel also filed a motion to dismiss the application. OPC also argues that the application is an attempt to change the terms of the agreement. Movants argue that if Aquila is allowed to redefine its fuel expenses as an asset, then Aquila will be in a position to pass the costs on to its customers rather than absorb the expense. And, that Movants understood the agreement to require Aquila to absorb the costs, rather than pass it on to customers.

The Staff of the Commission filed a Recommendation and Response on September 24, 2004. Staff also states that by requesting an Accounting Authority Order, Aquila is attempting to circumvent the agreement. Staff adds that Aquila's attempt to unilaterally modify the agreement is a collateral attack on the Commission's order approving the agreement.

FINDINGS OF FACT

The Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Does the agreement reached in the rate case address the treatment of fuel costs?

Aquila emphasizes in its application that the IEC, agreed to in its last rate case, does not address how Aquila should record any under collections.² However, the first sentence of the Agreement Regarding Fuel and Purchased Power Expense – Interim Energy Charge, which is part of the Stipulation and Agreement, states that “[t]he Parties agree that resolution of the fuel and purchased power expense issues in Case Nos. ER-2004-0034 and HR-2004-0024³ has been achieved as among themselves by an Interim Energy Charge. . . .” And, in paragraph 6 of the agreement, the word “expense” occurs at least five times in reference to the fuel and purchased power that is the subject of the IEC.

Furthermore, in paragraph 1, section “d” of the same document, the parties state that these amounts are meant to include only the Missouri retail variable costs accumulated in the FERC account number 501, 547 and 555” The Commission takes official notice that FERC account numbers 501, 547 and 555 are

² Paragraph 16 of Aquila's application, filed on August 4, 2004.

³ During the rate case, ER-2004-0034 and HR-2004-0024 were consolidated, with ER-2004-0034 being the lead case.

expense accounts.⁴ These accounts are again referred to in paragraph 4 of the IEC portion of the agreement. Lastly, Gary Clemmons, a regulatory manager for Aquila, testified during an on-the-record presentation that if the cost to Aquila goes above the IEC ceiling, then Aquila would just “eat that amount.”⁵

Although the parties do not explicitly state in the agreement that Aquila is to treat its under-collected fuel costs as an expense rather than a regulatory asset, the costs are described as expenses in the agreement. Furthermore, the parties assume in the agreement that the costs will be as recorded in FERC account numbers that are titled as expenses accounts. The Commission therefore finds that it is apparent from the agreement that the parties intended to treat fuel and purchased power expenses, as expenses. The Commission further finds that the public interest would not be served disturbing the agreement.

Was the volatility of natural gas prices contemplated in the agreement that resolved Aquila’s last rate case?

In its application for an Accounting Authority Order, Aquila points out that “[I]n recent years, the natural gas market has been extremely volatile creating great price risk for Aquila. . . . Without an IEC, Aquila would be subject to the fuel risk of these markets and either profit or suffer losses.”⁶ Aquila goes on to add that the price of natural gas has risen above the highest price contemplated while the parties agreed to the IEC.⁷ Aquila attributes the increase in oil prices to the instability in the Middle-East oil supplies.⁸ However, instability in the Middle East was a reality during April, 2004, the time during which the parties to the rate case entered into the agreement. Furthermore, during the prehearing conference in this matter, Aquila stated that it contemplated the possibility that natural gas prices would go outside of the range as indicated in the agreement.⁹ The Commission therefore finds that although natural gas prices have risen since April, 2004, the possibility of such was contemplated at the time the parties resolved Aquila’s fuel and purchased power expenses through the IEC.

CONCLUSIONS OF LAW

Jurisdiction

Aquila is an electrical corporation and a public utility as defined in Section 386.020, RSMo 2000, and is subject to the Commission’s jurisdiction under Section 386.250 RSMo, 2000.

⁴ 18 CFR Part 101–Subchapter C, Accounts, Federal Power Act.

⁵ Transcript of Hearing in Case No. ER-2004-0034, Volume 20, date April 5, 2003, page 1915, line 25.

⁶ Paragraph 9 of Aquila’s Application for Accounting Authority Order, filed August 4, 2004.

⁷ Paragraph 17 of Aquila’s Application for Accounting Authority Order, filed August 4, 2004.

⁸ Paragraph 17 of Aquila’s Application for Accounting Authority Order, filed August 4, 2004.

⁹ Transcript, Volume I, p. 10, lines 5-15.

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Aquila's Application

Section 393.140(4), RSMo 2000, authorizes the Commission to prescribe a uniform system of accounts for electric companies. Under this authority, the Commission directs that electric corporations keep accounts that are in conformity with Uniform System of Accounts Prescribed for Public Utilities and Licensees, published at 18 CFR Part 101.¹⁰ However, at 4 CSR 240-20.030(5), the Commission may waive the requirement to keep accounts as codified under the Uniform System of Accounts "for good cause shown." Aquila's request for an Accounting Authority Order rests upon the high price of fuel. Balanced against the high price of fuel is that Aquila has entered into an agreement that both contemplated the high price of fuel and provided a mechanism to address that concern. Although the parties may not have agreed to a price that is as high as prices are, certain risks were assumed and a bargain was struck among the parties in the rate case.

The test the Commission has used for determining whether good cause exists to grant an AAO is whether the expense to be deferred is "extraordinary, unusual and unique and not recurring."¹¹ Typically, the Commission has granted Accounting Authority Orders for unforeseen incidents that involve acts of God, or changes in the law. These incidents occur at one point in time. Aquila's request, however, involves fluctuating fuel prices. This is a condition that will outlast the two-year Interim-Energy-Charge period and is a condition that was contemplated during the time Aquila entered into the agreement in the rate case. To grant Aquila's request would be to change the agreement and the expectations that led to its terms. The Commission concludes that Aquila has not shown good cause for the Commission to grant the request for an Accounting Authority Order and ignore the IEC portion of the Stipulation and Agreement.

Summary Determination

Commission rule 4 CSR 240-2.117(2) states that the Commission may, on its own motion, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest. The law requires that Aquila use the Uniform System of Accounts. The Commission may waive this requirement if good cause is shown. The Commission has found that good cause does not exist to allow Aquila to vary from the Uniform System of Accounts. Summary determination is therefore not contrary to law.

The time and cost to hold hearings on this matter when there is no genuine issue as to any material fact would be contrary to the public interest. Furthermore, it is in the public interest to recognize Stipulation and Agreements that have been approved by the Commission. The Stipulation and Agreement is comprised of many issues that are dependent on one another. For the Commission to disturb one issue of the agreement would necessitate revisiting the agreement in its entirety. If the Commission granted Aquila's request, Aquila would be in a position to pass the cost of fuel on to its customers in Aquila's next rate case. This is contrary to the parties' understanding that Aquila would absorb any under-collections. The

¹⁰ 4 CSR 240-20.030.

¹¹ *In the Matter of Missouri Public Service*, 1 MPSC 3d 200, 205 (1991).

Commission concludes that a determination on the pleadings is not contrary to the public interest and will therefore deny the application.

IT IS THEREFORE ORDERED:

1. That Aquila, Inc.'s Application for an Accounting Authority Order is denied.
2. That this order shall become effective on October 17, 2004.
3. That this case may be closed on October 18, 2004.

Gaw, Ch., Murray, Clayton, Davis, and Appling, CC., concur.

Jones, Regulatory Law Judge

**In the Matter of Missouri Gas Energy's Tariffs to Implement a
General Rate Increase for Natural Gas Service.***

*Case No. GR-2004-0209
Decided October 19, 2004*

Gas §18. Rates §69. In the judgment of the Commission, the company and the Office of the Public Counsel failed to establish sufficient reason to rehear the Commission's decision regarding the company's request for a rate increase.

**ORDER DENYING APPLICATIONS FOR REHEARING, BUT
CLARIFYING REPORT AND ORDER**

On September 21, 2004, the Commission issued a Report and Order regarding Missouri Gas Energy's request for a rate increase. That Report and Order became effective on October 2. On October 1, Missouri Gas Energy and the Office of the Public Counsel filed timely applications for rehearing.

Public Counsel contends that the Commission should rehear those portions of its Report and Order relating to the customer service part of the incentive compensation plan, the return on equity adopted by the Commission, and the Commission's refusal to strike portions of MGE witness John Dunn's direct testimony. MGE's application for rehearing asks the Commission to rehear those portions of its Report and Order relating to the capital structure and rate of return on common equity that the Commission used to calculate MGE's cost of capital.

Section 386.500.1, RSMo (2000), provides that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." In the judgment of the Commission, Public Counsel and MGE have failed to establish sufficient reason to grant their Motions for Rehearing.

MGE and Public Counsel, in addition to their applications for rehearing, also filed motions for clarification. These motions point out what they assert are factual misstatements in the Report and Order and ask the Commission to clarify those statements to correctly reflect the record evidence.

MGE's motion points out that on page 83 of its Report and Order, the Commission refers to the "weather mitigation rate design proposed by MGE" when the subsequent discussion actually refers to the weather normalization clause that MGE proposed as an alternative to the weather mitigation rate design that it originally proposed. MGE is correct. The Commission will clarify that the weather mitigation rate design is different than the weather normalization clause and the Report and Order's conclusions of law regarding Issue 14, Volumetric Rate Elements, relate to the weather normalization clause and not the weather mitigation rate design.

*This case was appealed to Cole County Circuit Court (04CV326262, consolidated with 04CV326643). This case was appealed to the Missouri Court of Appeals Western District (WD65366 consolidated with WD65649). In addition, see Volume 12, MPSC 3d page 582 and 647 for other orders in this case.

Public Counsel's motion asks for clarification regarding four factual statements in the Report and Order that Public Counsel contends are incorrect. First, Public Counsel points out that at page 7 of its Report and Order the Commission states "the price that MGE must pay to purchase and transport natural gas is passed through, dollar for dollar to its customers through the PGA/ACA process." Public Counsel concedes that the Commission's statement was correct before this Report and Order became effective, but contends that the Commission's decision to move capacity release/off-system sales revenue from base rates to the PGA/ACA process with a sharing grid has changed that situation so that MGE's costs are no longer passed through dollar for dollar. Public Counsel has not sought rehearing on that issue but asks the Commission to correct its Report and Order so that customers are not left with the false impression that gas costs are passed through dollar for dollar.

The Commission finds that its Report and Order is quite clear on this question. The statement regarding pass through of costs in the PGA was simply a statement of the general operation of the PGA process. The changes to the PGA process that result from this Report and Order are clearly indicated in the Report and Order. There is no need for clarification on this point.

Public Counsel's second request for clarification concerns the Commission's statement on page 12 of its Report and Order that "Public Counsel's witness Travis Allen reported that his group of 8 comparable companies had an average capital structure containing 49.75% equity." That statement was based on the numbers contained in exhibit 32, which was prepared by Allen and admitted into evidence during his cross-examination at the request of MGE. Public Counsel contends that exhibit 32 was calculated at the request of MGE, only for the purpose of explaining Allen's proposed hypothetical capital structure. In his direct testimony, Allen reported that the average common equity ratio for his eight proxy companies was 40.00 percent. Public Counsel urges the Commission to correct its Report and Order so that Public Counsel's position is not inaccurately portrayed in the decision.

There is an inconsistency between the average common equity ratio that Allen reports for his comparable companies in his direct testimony and what he indicated in an exhibit he prepared at the hearing. The Commission's Report and Order cited the exhibit prepared at the hearing for the proposition that "a shareholder's investment in Southern Union is more risky than an investment in an average LDC." Since the Commission found that Southern Union has a capital structure containing only 29.99% common stock, that statement is true whether Allen's proxy companies had an average equity ratio of 49.75% or 40.00%. There is no need for clarification of the Commission's Report and Order on this point.

Public Counsel's third request for clarification concerns a statement in the Report and Order regarding the qualifications of MGE's witness Dr. Roger Morin. At page 18 of the Report and Order, the Commission states "Dr. Morin wrote the textbook, *Regulatory Finance*, upon which the other witnesses rely in their own testimony." Public Counsel correctly points out that its witnesses testified that they had not read Dr. Morin's book, although Public Counsel did use Dr. Morin's book to impeach the testimony of MGE's witness Mr. Dunn. The Report and Order is clarified accordingly.

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Public Counsel's fourth request for clarification concerns a statement in the Report and Order that Travis Allen filed his direct testimony in this case only two weeks after he started working for Public Counsel. Public Counsel correctly points out that the evidence is that Allen started working on his testimony two weeks after he started working for Public Counsel, but filed it approximately two weeks later, four weeks after he started working for Public Counsel. The Report and Order is clarified accordingly.

IT IS THEREFORE ORDERED:

1. That the Application for Rehearing filed by the Office of the Public Counsel is denied.
2. That the Application for Rehearing filed by Missouri Gas Energy, a division of Southern Union Company, is denied.
3. That the Report and Order previously issued in this case is clarified as specified in the body of this order.
4. That this order shall become effective on October 19, 2004.

Murray, Davis and Appling, CC., concur
Gaw, Ch., and Clayton, C., dissent

Woodruff, Senior Regulatory Law Judge

**In the Matter of the Application of Citizens Electric Corporation
for Cancellation of its Tariff, P.S.C. Mo. Nos. 2 and 7.**

*Case No. ED-2004-0223
Decided October 19, 2004*

Electric §9. Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. The Commission will, however, continue to regulate the safety and reliability of Citizens' operations.

Electric §15. Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. Citizens must, however, continue to comply with the relevant provisions of 4 CSR 240-3.190. Citizens must also notify the Commission of fundamental changes in the company's operations.

Electric §15. Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. Citizens must, however, continue to comply with the relevant provisions of 4 CSR 240-3.190. Citizens must also notify the Commission of fundamental changes in the company's operations.

Public Utilities §26. Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. Citizens must, however, continue to comply with the relevant provisions of 4 CSR 240-3.190. Citizens must also notify the Commission of fundamental changes in the company's operations.

ORDER CANCELING TARIFF SHEETS

Syllabus: This order cancels the tariff sheets of Citizens Electric Corporation.

Background:

On November 13, 2003, Citizens Electric Corporation filed an Application for Cancellation of Tariff. Citizens noted that on August 28, 2003, Senate Bill No. 255 went into effect, amending Section 393.110, RSMo. Citizens states that the amendment "effectively limits Missouri Public Service Commission's jurisdiction of Citizens in that it will no longer regulate Citizens' rates, financing, accounting, or management but will continue to regulate the safety and reliability of Citizens' operations." Citizens requested that the Commission issue an order canceling the company's tariff and acknowledging that the company's certificate of convenience and necessity remains in effect.

On November 18, 2003, the Commission issued an order directing its Staff to file a response. Staff complied on December 18, 2003, and recommended that the Commission grant the company's request to cancel its tariffs, but deny the company's request to leave its certificates of convenience and necessity in effect. Instead, Staff recommended that the Commission cancel the company's certificates of convenience and necessity.

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Citizens filed its response to Staff's recommendation on January 16, 2004. The company opposed Staff's recommendation that the Commission cancel the company's certificates of public convenience and necessity. On January 26, 2004, Staff filed its Reply to Citizens' Response. Staff no longer recommended that the Commission cancel the company's certificates of convenience and necessity, and instead requested that the Commission direct Citizens to provide further information regarding what Citizens maintains are the powers of the Commission over the company after Senate Bill No. 255, now Section 393.110.2, RSMo Supp. 2003.

Citizens filed a response on April 21, 2004, in which the company addresses the Commission's continued jurisdiction over Citizens pursuant to Sections 386.310.1, 386.800, 393.106 and 394.312, RSMo. The Commission subsequently issued an order directing its Staff to file a response to Citizens' April 21st pleading.

Staff filed its Supplemental Response and Recommendation on June 17, 2004. Staff notes that Citizens, in its April 21st response, discusses the Commission's jurisdiction under Section 393.110.2, RSMo, as follows:

Citizens believes that the Commission will continue to regulate it as to reliability and safety and that Citizens will continue to adhere to the NESC requirements.¹ Citizens agreed to furnish outage information to Staff on an informal basis, but understood that it is no longer required to file an annual report, monthly surveillance reports, or outage reports. Citizens also understood that it would no longer be assessed annual fees. In addition, Citizens requested that any consumer complaints received by the Missouri Public Service Commission be forwarded directly to Citizens' Chief Executive Officer, currently Tony Campbell.

Staff states that it does not dispute Citizens statements, but that Staff believes that certain provisions of 4 CSR 240-3.190 do apply to Citizens. Staff contends that the provisions addressing safety, which apply to electrical corporations and rural electric cooperatives alike, apply to Citizens. Staff therefore suggests that the Commission (a) cancel Citizens' tariff sheets, (b) not cancel the certificates of convenience and necessity held by Citizens, (c) order Citizens to comply with the relevant provisions of 4 CSR 240-3.190, and (d) order Citizens to provide to the Staff and the Office of the Public Counsel reasonable advance notice of any fundamental change that it intends to effectuate in the operation of Citizens, including any transactions specified in Section 393.190.1, RSMo.

¹ 4 CSR 240-18.010 Safety Standards for Electric Utilities, Telecommunications Companies and Rural Electric Cooperatives:

PURPOSE: This rule prescribes minimum safety standards relating to the operation of electric and telecommunications companies and rural electric cooperatives....

(1) The commission adopts as its rule and incorporates by reference, Parts 1, 2 and 3 and Sections 1, 2 and 9 of the American National Standard, National Electrical Safety Code (NESC); 2002 Edition as approved by the American National Standards Institute on June 4, 2001....

The Commission subsequently directed Citizens to file a supplemental response clarifying whether it believes that 4 CSR 240-3.190 applies to Citizens. Citizens complied on August 10, 2004, stating that it agrees that it is subject to the Commission's safety regulations and noting that it intends to comply fully with the Commission's safety regulations, including 4 CSR 240-3.190(4) and (5).

Discussion:

Citizens is a Missouri not-for-profit electric corporation doing business in Southeast Missouri. Citizens provides electric service to over 24,980 consumers who are also members of the corporation. Citizens notes that as successor to Genevieve Electric Cooperative, Citizens was granted a certificate of service authority by the Commission.

On August 28, 2003, Senate Bill No. 255 went into effect, amending Section 393.110 of the Revised Statutes of Missouri. Section 393.110.2, as amended, provides that:

. . . the public service commission shall not have jurisdiction over the rates, financing, accounting, or management of any electrical corporation which is required by its bylaws to operate on the not-for-profit cooperative business plan, with its consumers who receive service as the stockholders of such corporation, and which holds a certificate of public convenience and necessity to serve a majority of its consumer-owners in counties of the third classification as of August 28, 2003. . . .

Consequently, the Commission no longer has the authority to regulate Citizens' rates, financing, accounting, or management. The Commission will, however, continue to regulate the safety and reliability of Citizens' operations. Citizens, therefore, requests that the Commission cancel its tariffs, P.S.C. Mo. Nos. 2 and 7.

After reviewing Citizens' request and supplemental filings, along with those of Staff, the Commission finds that Citizens' tariffs should be canceled. And as recommended by Staff, the Commission will also direct Citizens to comply with the relevant provisions of 4 CSR 240-3.190, and will order Citizens to provide to Staff and to the Office of the Public Counsel reasonable advance notice of any fundamental change that it intends to effectuate in the operations of Citizens, including any transactions specified in Section 393.190.1, RSMo. The Commission will not cancel Citizens' certificate of convenience and necessity.

IT IS THEREFORE ORDERED:

1. That Citizens Electric Corporation's request for its tariff sheets to be canceled is granted. Citizens Electric Corporation's tariffs P.S.C. Mo. No. 2 and P.S.C. Mo. No. 7, both contained in the Commission's Tariff File No. JE-2002-0296, are hereby canceled.
2. That Citizens Electric Corporation is directed to comply with the relevant provisions of 4 CSR 240-3.190.

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3. That Citizens Electric Corporation is directed to provide to the Commission's Staff and to the Office of the Public Counsel reasonable advance notice of any fundamental change that it intends to effectuate in the operations of Citizens.

4. That this order shall become effective on October 29, 2004.

5. That this case may be closed on October 30, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.
Ruth, Senior Regulatory Law Judge

James Dudley, Complainant, v. Missouri Gas Energy, Respondent.*

*Case No. GC-2004-0216
Decided October 19, 2004*

Evidence §1. In the Commission's October 19, 2004 Report and Order, it dismissed part of the Complaint on the basis that the Complainant failed to show evidence that Missouri Gas Energy violated its tariff or Commission rules by disconnecting Complainant's gas service because of the past-due amount owed by Complainant.

Gas §1. The Commission found that Missouri Gas Energy did not violate the notice requirement of its tariff or the Commission's rules when it disconnected the Complainant's service in July 2002.

Gas §1. The Commission also found that Missouri Gas Energy discontinued service based on Complainant's failure to pay the past-due debt for service received at his residence, which did not violate Section 8.08 of the Company's tariff.

Gas §33. Missouri Gas Energy (MGE) applied a tenant's past-due debt to Complainant's account at his residence, alleging that the debt was transferable because Complainant benefited from the gas service because his property was heated during the time period in question and was thus protected from cold temperatures. The Commission determined that company's tariff does not permit MGE to hold Complainant liable to the past-due debt of his tenant. The Commission ordered MGE to remove the tenant's past-due from Complainant's account, along with all associated late fees.

APPEARANCES

James Dudley, 4247 Agnes, Kansas City, Missouri 64130, *pro se*.

Dean L. Cooper, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Missouri Gas Energy, a division of Southern Union Company.

Herman A. "Woody" Loepp, Attorney at Law, Missouri Gas Energy, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy, a division of Southern Union Company.

Robert S. Berlin, Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Vicky Ruth, Senior Regulatory Law Judge.**

* The Commission, in an order issued on November 9, 2004, denied applications for rehearing in this case.

REPORT AND ORDER

Syllabus: In this order, the Commission finds that Missouri Gas Energy 1) did not violate its tariff or Commission rules when it discontinued service to Mr. Dudley's residence at 4231 Tracy; and 2) did violate its tariff when it transferred the \$2,099.96 debt of Sara Chappelow to James Dudley.

Procedural History

On November 7, 2003, James Dudley filed a complaint against Missouri Gas Energy (MGE), alleging that the company turned off his natural gas service due to the nonpayment of a bill that he does not owe. Mr. Dudley stated that he was the landlord and owner of property at 4024 Prospect, Kansas City, Missouri. In his complaint, Mr. Dudley indicated that a Ms. Sara Chappelow had gas service in her name from September 26, 2000, until April 26, 2001, and incurred a past due debt of \$2,099.00 [sic].¹ Mr. Dudley claims that MGE transferred that past due amount to his home account at 4231 Tracy, Kansas City, Missouri, in June 2002. Mr. Dudley also contends that MGE discontinued gas service to his home on July 20, 2002, for nonpayment of a \$2,510.00 bill.

Mr. Dudley filed a nearly identical complaint on November 13, 2003; this case was assigned Case No. GC-2004-0222 and was later consolidated with the current case, GC-2004-0216. The Commission designated Case No. GC-2004-0216 as the lead case.

The Commission issued notice of the two complaints on November 18, 2003. MGE timely filed its answer on December 16, 2003. MGE contends that it acted in accordance with its tariff when it (1) discontinued service to Mr. Dudley's account at 4231 Tracy; and (2) transferred the debt of \$2,099.96 to Mr. Dudley's account. Mr. Dudley filed a response to MGE's answer on December 22, 2003.

The Commission's Staff filed its Recommendation and Memorandum on January 20, 2004. Staff recommended that the Commission issue an order finding that 1) Mr. Dudley owes MGE \$104.63 for gas service taken out by him at 4024 Prospect, in Kansas City, Missouri, for the period of July 2001 through April 2002; and 2) that Mr. Dudley is not responsible for the past-due debt of \$2,099.96 for gas service at 4024 Prospect for the time period of October 2000 through April 2001.

MGE responded to Staff's Recommendation and Memorandum on February 3, 2004. Mr. Dudley filed a response on March 17, 2004.

The Commission issued an order adopting a procedural schedule on April 16, 2004. The Commission conducted an evidentiary hearing on June 18, 2004. The transcript was filed on July 7, 2004. The parties filed briefs on July 16, 2004. Mr. Dudley filed his reply brief on July 26, 2004, and again on July 29, 2004.

¹ As discussed later, the evidence establishes that the debt was in the amount of \$2,099.96.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Service at 4024 Prospect: October 2000 through April 2001

Upon the application for new gas service by a person identified as Sara Chappelow, Missouri Gas Energy initiated an order for gas service at 4024 Prospect on September 26, 2000.² MGE accepted Sara Chappelow into the level payment program and accepted payments on Ms. Chappelow's account in the amounts of \$12.00, \$66.00, and \$80.34, respectively, on November 2, 2000, December 3, 2000, and January 4, 2001.³

On or about April 26, 2001, MGE turned off Ms. Chappelow's gas service due to the nonpayment of a past due debt of \$2,099.96.⁴

Mr. Dudley is the owner and landlord at 4024 Prospect.⁵ Mr. Dudley does not know Sara Chappelow and believes that he leased the property to a person named Diana during the period that the person identified as Sara Chappelow incurred the \$2,099.96 debt owed to MGE.⁶ Mr. Dudley did not reside at 4024 Prospect and was not a member of Diana's household.⁷ It appears that the person who established service in Ms. Chappelow's name was not Ms. Chappelow.⁸

Service at 4024 Prospect: August 2001 through April 2002

Mr. Dudley took out gas service in his name at 4024 Prospect during the period of August 3, 2001, through April 17, 2002, for the purpose of cleaning up the property.⁹ During this period Mr. Dudley incurred a debt with MGE of \$104.63.¹⁰ MGE turned off gas service at 4024 Prospect on April 17, 2002.¹¹ At the hearing, Mr. Dudley acknowledged that he owes the bill for \$104.63.¹²

The Commission finds that Mr. Dudley owes MGE the past-due amount of \$104.63 for gas service at 4024 Prospect for the period of August 2001 through April 2002.

² Tr. 212, lines 4-7.

³ Exh. 1, Russo's Corrected Direct Testimony, p. 4, lines 17-20.

⁴ Tr. 214-215.

⁵ Exh. 4, Dudley's Direct Testimony, pp. 2-3.

⁶ Tr. 65-68.

⁷ Tr. 76, lines 16-20.

⁸ Exh. 1, Russo's Corrected Direct Testimony, p. 5, line 15 – p. 7, line 5.

⁹ Exh. 1, Russo's Corrected Direct Testimony, p. 5, lines 7-8.

¹⁰ Exh. 3, Bolden's Rebuttal Testimony, p. 8, line 1, and Exh. 7, p. 6.

¹¹ Exh. 3, Bolden's Rebuttal Testimony, p. 7, line 6 and line 23 through p. 8, line 1.

¹² Tr. 58, line 18 – p. 59, line 13.

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Transfer of Ms. Chappelow's Debt to Mr. Dudley:

On April 24, 2002, MGE transferred Ms. Chappelow's balance of \$2,099.96 from her account at 4024 Prospect to Mr. Dudley's account at 4024 Prospect.¹³ On June 25, 2002, MGE transferred the amount of \$2,204.59 (Ms. Chappelow's debt of \$2,099.96 plus the \$104.63 incurred by Mr. Dudley at the 4024 Prospect address) to Mr. Dudley's account at 4231 Tracy.¹⁴

Discontinuance at 4231 Tracy:

1. Basis for Discontinuance:

On July 24, 2002, MGE discontinued natural gas service to 4231 Tracy, Mr. Dudley's residence.¹⁵ Mr. Dudley alleges that his service at 4231 Tracy was disconnected because MGE transferred Ms. Chappelow's unpaid debt, in the amount of \$2,099.96, to Mr. Dudley's account, and then discontinued his service when Mr. Dudley did not pay Ms. Chappelow's debt. Mr. Dudley argues that a discontinuance based upon this transfer was improper.

MGE's witness, Shirley Bolden, contends that the company discontinued service to 4231 Tracy because Mr. Dudley failed to pay his past-due debt for service he received at that address:

MGE notified Mr. Dudley of an impending disconnection of his gas service at 4231 Tracy. This disconnection was based upon Mr. Dudley's failure to pay for natural gas used at 4231 Tracy only. The amount due and owing in the disconnection notices sent to Mr. Dudley did not include any amounts related to the debt incurred at 4024 Prospect. Thus, the discontinuation of service at 4231 Tracy was solely for the nonpayment for service at 4231 Tracy."¹⁶

Staff also contends that MGE disconnected Mr. Dudley's gas service at 4231 Tracy in July 2002 because of the past due amount owed by Mr. Dudley for service provided to his Tracy residence and not because of any amount transferred from the Prospect rental property.¹⁷

MGE provided evidence showing that the company notified Mr. Dudley many times between May 2002 and July 2002 of an impending discontinuance of gas service at 4231 Tracy.¹⁸ Specifically, the company provided the following notices to Mr. Dudley at the Tracy Street address:

¹³ Exh. 3, Bolden's Rebuttal Testimony, p. 7, lines 7-8.

¹⁴ Tr. 14 and Exh. 3, Bolden's Rebuttal Testimony, p. 7.

¹⁵ Exh. 3, Bolden's Rebuttal Testimony, p. 8.

¹⁶ Exh. 3, Bolden's Rebuttal Testimony, p. 2, lines 16-21.

¹⁷ Tr. 205, lines 9-21.

¹⁸ Exh. 3, Bolden's Rebuttal Testimony, Schedules SB-1-1 through SB-4-2.

- On May 5, 2002, MGE mailed a disconnect notice to Mr. Dudley.¹⁹
- On May 15, 2002, MGE mailed Mr. Dudley a 96-hour notice for shut-off, indicating a past-due amount of \$202.53.²⁰
- On May 16, 2003, MGE left a message at 4231 Tracy concerning shut-off due to the past-due amount of \$202.53.²¹
- On June 10, 2002, MGE mailed another disconnect notice.²²
- On June 14, 2002, MGE mailed a 96-hour notice for shut-off indicating a past-due amount of \$266.95.²³
- On June 15, 2002, MGE contacted a person at the Tracy Street residence concerning shut-off for the past-due amount of \$266.95.²⁴
- On July 10, 2002, MGE mailed another disconnect notice.²⁵
- On July 16, 2002, MGE mailed a 96-hour notice for shut-off containing a past-due amount of \$306.16.²⁶
- On July 17, 2002, MGE left a message at the Tracy Street residence concerning shut-off for the past-due amount of \$306.16.²⁷

In the midst of these many notices, the company transferred the account balance of \$2,204.59 from Mr. Dudley's 4024 Prospect account to his 4231 Tracy account.²⁸ The \$2,204.59 represents Ms. Chappelow's debt of \$2,099.96, plus the \$104.63 incurred by Mr. Dudley at the Prospect address.

On July 24, 2002, gas service at 4231 Tracy was shut off at the meter.²⁹

The Commission notes that these disconnect notices refer to a past-due amount that varies from \$202.53 to \$306.16, amounts far lower than the \$2,204.59 transferred from the Prospect account on June 25, 2002.³⁰

The Commission finds that, when viewed as a whole, the evidence shows that MGE terminated Mr. Dudley's service due to his failure to pay for service provided to 4231 Tracy.

¹⁹ Exh. 3, Bolden's Rebuttal Testimony, SB-1-1.

²⁰ Exh. 3, Bolden's Rebuttal Testimony, SB-1-3.

²¹ Exh. 3, Bolden's Rebuttal Testimony, SB-1-5 and SB-1-6.

²² Exh. 3, Bolden's Rebuttal Testimony, SB-1-7.

²³ Exh. 3, Bolden's Rebuttal Testimony, SB-1-9.

²⁴ Exh. 3, Bolden's Rebuttal Testimony, SB-1-11 and SB-1-12.

²⁵ Exh. 3, Bolden's Rebuttal Testimony, SB-2-1.

²⁶ Exh. 3, Bolden's Rebuttal Testimony, SB-3-1.

²⁷ Exh. 3, Bolden's Rebuttal Testimony, SB-4-1 and SB-4-2.

²⁸ Exh. 3, Bolden's Rebuttal Testimony, SB-5-1.

²⁹ *Id.*

³⁰ Exh. 3, Bolden's Rebuttal Testimony, p. 7.

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2. Notice of Discontinuance

Mr. Dudley also argues that MGE did not provide proper notice of the impending discontinuance of service. Mr. Dudley alleges that he never saw any of the disconnect notices that MGE claims to have sent, and that he did not hear of any of the messages allegedly left at his residence.³¹ Nonetheless, Mr. Dudley provided to the Commission one of the bills that he claimed never to have received.³² In explanation, Mr. Dudley indicated that he often did not bother to open mail from MGE.³³

The Commission finds Mr. Dudley's testimony that he did not receive any of the disconnect notices or messages to be not credible. The Commission further finds that the company notified Mr. Dudley repeatedly of the impending discontinuance.

Billing Dispute:

At the hearing and in his prefiled testimony, Mr. Dudley appears to allege that, prior to the discontinuance at 4231 Tracy, he disputed both the charges from the 4024 Prospect account and the charges for service to his residence at 4231 Tracy.³⁴ Mr. Dudley's testimony, however, is confusing and somewhat contradictory on this issue. For example, in his direct testimony, Mr. Dudley acknowledges that the bills for \$104 [his bill for the 4024 Prospect account] and for \$305 [his bill for service at 4231 Tracy] did not become an issue to him until after discovery was finished in this case.³⁵ If these bills were not an issue to him, it is understandable how he might not have communicated to MGE his intent to dispute the charges for the Prospect account *and* the charge for the Tracy account.

More importantly, Mr. Dudley's July 18, 2002 letter to the Commission refers only to a dispute regarding charges at the Prospect address.³⁶ Mr. Dudley indicates that he was writing "in regard to a gas bill for 2,204.59" that he says does not belong to him.³⁷ That amount, \$2,204.59, is the amount reflected on Mr. Dudley's bill that was transferred from 4024 Prospect.³⁸ Thus, it is separate from the previous past-due balance of approximately \$306.00 for service provided to his residence at 4231 Tracy. Consequently, this letter does not indicate that Mr. Dudley has a billing dispute regarding his account at 4231 Tracy.

Notes on the Commission's Consumer Complaint Inquiry form, dated July 30, 2002, also indicate that Mr. Dudley's dispute with MGE was due to MGE transferring

³¹ Tr. 6-64.

³² Tr. 96.

³³ Tr. 97-98.

³⁴ Tr. pp 72; Exh. 5, Dudley's Surrebuttal Testimony, p. 1, lines 10-17 and p. 3, lines 19-21; p. 7, lines 7-18.

³⁵ Exh. 5, Dudley's Surrebuttal Testimony, p. 3, lines 5-6.

³⁶ Attachment to Exh. 4, Dudley's Direct Testimony.

³⁷ Exh. 7.

³⁸ Exh. 5, Dudley's Surrebuttal Testimony, Sch. 1.

Ms. Chappelow's past-due charges of \$2,204.59 [sic] from 4024 Prospect to Mr. Dudley's account at 4231 Tracy.³⁹

Furthermore, Mr. Dudley's complaint, filed on November 7, 2003, indicates that the basis of his complaint is that MGE turned off his service for a gas bill that was in Sara Chappelow's name.⁴⁰ Mr. Dudley did not mention a dispute regarding service provided to 4231 Tracy. Mr. Dudley filed a nearly identical complaint on November 13, 2003, which also indicates that the basis of his complaint was the transfer of Ms. Chappelow's bill to Mr. Dudley's account. Once again, Mr. Dudley did not indicate that he also disputes a bill for natural gas service provided to his residence at 4231 Tracy.

The Commission finds that Mr. Dudley disputed the amounts transferred from 4024 Prospect, but did not dispute the bill for service provided to 4231 Tracy.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction:

MGE is a "gas corporation" and a "public utility" as those terms are defined in Missouri Public Service Commission law.⁴¹ The Missouri Public Service Commission, therefore, has jurisdiction over the services, activities, and rates of MGE.⁴²

The Commission is authorized to hear and determine complaints made by "any corporation or person" concerning "any act or thing done or omitted to be done by any corporation, person or public utility."⁴³

A tariff that has been approved by the Commission has the same force and effect of a statute.⁴⁴

Burden of Proof:

The Complainant, Mr. Dudley, bears the burden of proof in a case, such as this one, in which the Complainant alleges that a regulated utility has engaged in unjust or unreasonable actions.⁴⁵ Thus, Mr. Dudley must establish all facts necessary to support the relief he seeks by a preponderance of credible evidence.

Discussion:

1. Did MGE violate either its tariff or the Commission's rules when MGE transferred the \$2,099.96 debt incurred by the person identified as Sara Chappelow to Mr. Dudley's account?

⁴¹ Section 386.020(18) and (42), RSMo Supp. 2001. Section 386.010 states that Chapter 386 shall be known as the "Missouri Public Service Commission Law."

⁴² Sections 386.020(42) and 386.250(1), RSMo Supp. 2001.

⁴³ Section 386.390.1, RSMo 2000.

⁴⁴ *Allstates Transworld Van Lines, Inc. v. Southwestern Bell Telephone Co.*, 973 S.W.2d 314,317 (Mo. App. E.D. 1996).

⁴⁵ *Ahlstrom v. Empire District Electric Company*, 4 Mo. P.S.C.3d 187, 202 (1995); *Margulis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991).

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Mr. Dudley and Staff argue that MGE improperly transferred Ms. Chappelow's bill, in the amount of \$2,099.96, to Mr. Dudley's account. MGE contends that its transfer was authorized by its tariff. Although MGE acknowledges that it does not have a policy of transferring the past-due debt of a tenant to a landlord, the company offered the following justification for the transfer:⁴⁶

Discontinuance on the basis of this transfer is appropriate because Mr. Dudley, as owner of the property at 4024 Prospect, received substantial benefit and use of the service due to the fact that the premise he owned was heated during the time period in question and was thus protected from the extremely cold temperatures that occurred during this period of time.⁴⁷

MGE also cites Section 3.02 of its tariff as authority for transferring the Chappelow debt and discontinuing Mr. Dudley's gas service to 4231 Tracy:

Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made. This provision cannot be avoided by substituting an application for service at the same or at a new location signed by some other member of the former customer's household or by any other person acting for or on behalf of such customer.

In order to expedite service to a customer moving from one location to another, Company may provide service at the new location before all bills and charges are paid for service at the prior location. Company reserves the right to transfer any unpaid amount from prior service(s) to a current service account. Such transferred bills are then subject to the provisions of Sections 7.07 and 7.08 herein.

The Commission determines that MGE's position is flawed. MGE's tariff, Section 1.04, defines "customer" as "[a] person or legal entity responsible for payment for service except one denoted as a guarantor. The term "customer" is also used to refer to an applicant for gas service." Commission Rule 4 CSR 240-13.015(D) states that "Customer means a person or legal entity responsible for payment for service except one denoted as a guarantor."

MGE admitted that it accepted Sara Chappelow's application, or the application of a person claiming to be Sara Chappelow, for new gas service at 4024 Prospect. The company admits that it turned on the gas service in Ms. Chappelow's name, placed Ms. Chappelow on a level payment plan, and accepted three payments on

⁴⁶ Tr. p. 151, line 24 through p. 152, line 2, and p. 217, lines 1-5.

⁴⁷ MGE's answer, p. 4.

her account. These actions demonstrate that Sara Chappelow, or the person representing herself to MGE as Sara Chappelow, is the “customer” responsible to MGE for gas service at 4024 Prospect from October 3, 2000, to April 26, 2001, in the amount of \$2,099.96. MGE provided no evidence that Mr. Dudley was the responsible “customer” pursuant to MGE’s tariff or the Commission’s rule. In addition, MGE has not provided any evidence that Mr. Dudley was a “guarantor” of Ms. Chappelow. The Commission determines that MGE has no authority by tariff or Commission rule to transfer Ms. Chappelow’s past-due debt to Mr. Dudley’s account.

MGE creatively argues that Mr. Dudley, as the owner of the 4024 Prospect property, received a “benefit and use of gas service” from Ms. Chappelow’s service in that his property was protected from further deterioration during the cold winter of 2000-2001.⁴⁸ Although novel, MGE’s argument borders on the ridiculous. In previous cases, the Commission has determined that for a person not named on an account to be held liable for utility charges, the unnamed person must have received “benefit and use of the service” sufficient to state a claim for relief in implied contract.⁴⁹ The Restatement of the Law, 2d Contracts, defines an implied contract as one where the intention of a party to make a contract may be implied; that is, the “intention to make a promise may be manifested . . . by implication from other circumstances, including course of dealing or usage of trade or course of performance.”⁵⁰ There are no facts in this case that show any conduct of Mr. Dudley that may infer an intent to benefit from Ms. Chappelow’s gas service. Any benefit that Mr. Dudley may have received from Ms. Chappelow’s gas service was unintended.

Thus, the Commission determines that MGE cannot hold Mr. Dudley responsible for the debt of his tenant, Ms. Chappelow, and that the transfer of Ms. Chappelow’s debt to Mr. Dudley’s account was improper. The Commission will direct MGE to remove Ms. Chappelow’s past-due debt from Mr. Dudley’s account, along with all associated late fees.

2. Did MGE violate either MGE’s tariff or the Commission’s rules when the company discontinued gas service to Mr. Dudley’s account at 4231 Tracy?

Mr. Dudley alleges that MGE violated its tariff and Commission rules by failing to provide proper notice to him regarding the impending discontinuance and by discontinuing his service during a billing dispute. MGE and Staff contend that the company did not violate the company’s tariff or the Commission’s rules when it disconnected Mr. Dudley’s service in July 2002.

Specifically, Mr. Dudley alleges that MGE violated 4 CSR 240-13.050. Commission Rule 4 CSR 240-13.050(1) states that service may be discontinued for any of eight specified reasons. The first reason listed is “Nonpayment of an undisputed delinquent charge.” MGE discontinued service because Mr. Dudley failed to pay

⁴⁸ Exh. 3, Bolden’s Rebuttal Testimony, p.8.

⁴⁹ *Bowman v. The Gas Service Company*, 27 P.S.C. (N.S) 44 (1984) and *Winkleman v. Associated Natural Gas Company*, 27 P.S.C. (N.S) 40 (1984).

⁵⁰ Restatement of the Law, Second, Contracts, Section 4, Comments paragraph a. (1981).

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the undisputed delinquent charge on the Tracy account. Therefore, this provision authorized the company to discontinue service.

Sections (3) through (5) of 4 CSR 240-13.050 refer to proper notice requirements. Among other things, these provisions provide that a utility shall not discontinue residential service under this section unless written notice is sent to the customer at least ten days prior to the date of the proposed discontinuance. MGE notified Mr. Dudley in writing of the pending discontinuance on July 10, 2002, and on July 16, 2002. MGE left a message at 4231 Tracy regarding the discontinuance on July 17, 2002. MGE discontinued service to the Tracy address on July 24, 2002. The Commission finds that MGE complied with the notice requirements of 4 CSR 240 13.050.

Mr. Dudley also claims that MGE also violated Sections 8.01, 8.06, and 8.08 of the company's tariff. Section 8.01 refers to the basic rules for complaints and disputed claims that are to be followed by the company and the customer. The section also sets forth the company's right when a customer fails to cooperate in the investigation of the dispute. Mr. Dudley, however, has failed to show that MGE violated this provision in any way. In fact, the evidence shows that MGE did properly record the disputed claim.

Section 8.06 of MGE's tariff indicates that if the company does not resolve the complaint to the satisfaction of the customer, the company shall advise the customer of the right to register an informal complaint with the Commission. Mr. Dudley provided no evidence that MGE violated this provision. Moreover, Mr. Dudley did file an informal complaint with the Commission regarding the bill transferred from Ms. Chappelow.

Section 8.08 of MGE's tariff addresses discontinuations pending a decision:

The Company shall not discontinue residential service or issue a notice of discontinuance relative to the matter in dispute pending the decision of the hearing examiner or other Commission personnel except pursuant to the terms of an interim determination.

The Commission has found that the disputed amount was the \$2,209.59 transferred from the 4024 Prospect account. MGE did not discontinue service based on the nonpayment of this amount. Instead, MGE discontinued service based upon Mr. Dudley's failure to pay the past due debt for service received at 4231 Tracy. Thus, MGE did not violate Section 8.08 of its tariff.

Decision

The Commission determines that MGE did not violate its tariff or Commission rules when it discontinued natural gas service to Mr. Dudley at 4231 Tracy on or about July 24, 2002. Therefore, the portion of Mr. Dudley's complaint regarding the discontinuance of service is dismissed.

The Commission, however, also determines that MGE's tariff does not authorize it to transfer Ms. Chappelow's past due debt to the account of Mr. Dudley. Thus, the Commission will grant part of Mr. Dudley's complaint and direct MGE to remove Ms. Chappelow's past due debt of \$2,099.96 from Mr. Dudley's account, including any late fees associated with this amount.

IT IS THEREFORE ORDERED:

1. That James Dudley's complaint is dismissed in part and granted in part.
2. That Missouri Gas Energy, a division of Southern Union Company, shall promptly remove the transferred amount of \$2,099.96 from Mr. Dudley's account as discussed above. Any late fees due to Mr. Dudley's failure to pay the transferred amount of \$2,099.96 shall also be removed.
3. That this Report and Order shall become effective on October 29, 2004.

Gaw, Ch., Murray, Clayton, Davis,
and Appling, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo 2000.

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**In the Matter of the Application to Intervene in Union Electric
Company d/b/a AmerenUE Proposed Tariff filed under Tariff
File No. JG-2005-0145.***

*Case No. GT-2005-0069
Decided October 28, 2004*

Gas §40. The Commission approved a tariff that will make AmerenUE transportation customers, served by Panhandle Eastern Pipe Line Company, subject to the same Commission-approved tariffs that apply to other AmerenUE transportation customers.

ORDER APPROVING TARIFF

Syllabus: This order approves a proposed tariff filed by Union Electric Company d/b/a AmerenUE that makes changes to the way some of its customers balance their gas usage and to the way imbalances are treated.

On August 30, 2004, AmerenUE filed a proposed tariff with an effective date of October 1, 2004, that would subject certain of its transportation customers to the burner tip balancing provisions in AmerenUE's tariffs. Those customers are transporting their gas on Panhandle Eastern Pipe Line Company, and have had their balancing performed by Panhandle, but Panhandle has made changes to its operations and will generally stop providing this balancing function on October 1, 2004.

The changes AmerenUE proposes to make to the currently effective tariff are limited. First, Paragraph I on Sheet No. 14 will change so that the currently effective balancing provisions apply to all customers that do not have balancing performed by their transportation pipeline. These provisions currently apply to AmerenUE's transportation customers served by other pipelines. This change is essentially a clarification of current tariff language with little substantive impact.

Second, a provision is added that will allow group balancing. Group balancing allows transportation to balance their gas usage as a group, rather than having each individual customer solely responsible for balancing. This provision will allow a group to take advantage of group members' offsetting positive and negative imbalances, resulting in fewer and lesser imbalance penalties. These two changes are the only ones made by the tariff filing.

In response to the tariff filing, ProLiance Energy, LLC, an AmerenUE transportation customer, filed a motion to suspend on September 17, 2004. ProLiance objects to the proposed tariffs because the daily imbalance threshold and the penalties for imbalances are different from those that have been imposed by Panhandle. ProLiance does not dispute the fact that Panhandle will no longer be providing this function, nor does it explain its assertion that AmerenUE's balancing

*On November 30, 2004, the Public Service Commission issued an order denying applications for rehearing. This case was appealed to Cole County Circuit Court (04CV327078).

provisions – already approved by the Commission and in effect for many of its customers – are unjust and unreasonable. ProLiance specifically states that it is not opposed to group balancing.

On September 24, 2004, MFA Incorporated and ONEOK Energy Marketing Company (an AmerenUE transportation customer and a gas marketer, respectively) jointly filed a motion to suspend. On the same day, Seminole Energy Services L.L.C. filed a motion to suspend. MFA and ONEOK state that they agree with ProLiance, and in addition, argue that AmerenUE's proposed tariff is discriminatory in that some Panhandle transportation customers will be subject to AmerenUE's balancing provisions and some will still be subject to Panhandle's. The changes proposed by AmerenUE will actually reduce any disparate treatment of its transportation customers. The changes to Paragraph I on Sheet No. 14 make clear that AmerenUE's balancing provisions apply to all customers who do not have balancing performed by the transporting pipeline, and eliminates the distinction between customers based on what pipeline they use for transportation. If it is true that Panhandle's tariff changes treat some of its customers differently, as MFA and ONEOK assert, then they may have cause to object to Panhandle's tariff, but it is clear that AmerenUE's proposed tariff does not unjustly discriminate among customers.

MFA and ONEOK also object to one specific aspect of AmerenUE's proposed group balancing:

... AmerenUE requires customers to provide written notice no later than ten (10) business days prior to the beginning of the month of their intent to have their accounts managed by a Group Manager. The ten day notice requirement is unreasonable. For example, if OEMC as a group manager is not provided actual monthly usage until the 9th business day of the month following the month in which the gas was delivered, it will not have sufficient time to invoice the customer, judge the timeliness of payments and then determine if the relationship with the customer should continue. If the purpose behind this tariff provision is to encourage group managers to provide group balancing to their customers, that purpose is unreasonably compromised by the ten day notice requirement. It imposes an unreasonable burden on supplying that service and should be rejected.

None of the other pleadings, including AmerenUE's response discussed below, address this aspect of AmerenUE's proposed tariff changes. However, as AmerenUE argued at the oral argument (discussed below) this ten day notice period is necessary to allow AmerenUE to administer the group balancing program. Ten days does not appear unreasonable, and the Commission will not suspend the proposed tariff based on this argument.

The rest of MFA's and ONEOK's objections, as well as those raised by Seminole, are similar to those of ProLiance discussed above. They simply oppose the provisions already in effect for other transportation customers, presumably on the grounds that the no-longer-available Panhandle balancing provisions were

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more favorable. None of the entities seeking suspension address the fact that the tariff provisions they oppose have already been found just and reasonable and approved by this Commission, and the fact that AmerenUE's proposed tariff would not make any changes to those provisions.

The Commission suspended the tariff until October 29, 2004, in order to investigate the claims of the parties opposing the tariff filing. To that end, the Commission held oral argument on October 13, 2004. All of the intervenors generally support the concept of group balancing, although, as noted above, MFA and ONEOK oppose one narrow aspect of AmerenUE's group balancing proposal.

The gist of the arguments raised by those entities seeking suspension or rejection of AmerenUE's tariff is that AmerenUE's balancing provisions are different (and, by inference, less attractive) than those of Panhandle. No one disagrees that Panhandle's balancing provisions are no longer available to the extent they were before October 1. To the extent that AmerenUE customers, including the intervenors in this case, can still get burner-tip balancing provided by Panhandle, they may still take advantage of that service. But since Panhandle's balancing service is no longer available to most of AmerenUE's customers, the most reasonable approach to the situation, and the one that AmerenUE has taken, is simply to make those AmerenUE transportation customers served by Panhandle subject to the same Commission-approved tariffs that apply to other AmerenUE transportation customers. The Commission will not further suspend or reject the proposed tariff, but will approve it for service after the initial suspension period ends.

IT IS THEREFORE ORDERED:

1. That the following tariff sheets, Tariff File No. JG-2005-0145, filed on August 30, 2004, by Union Electric Company d/b/a AmerenUE are approved for service on and after October 29, 2004:

P.S.C. MO. No. 2

First Revised SHEET No. 13.1, Canceling Original SHEET No. 13.1

Fifth Revised SHEET No. 14, Canceling Fourth Revised SHEET No. 14

Fourth Revised SHEET No. 15, Canceling Third Revised SHEET No. 15

Fourth Revised SHEET No. 16, Canceling Third Revised SHEET No. 16

First Revised SHEET No. 16.1, Canceling Original SHEET No. 16.1

2. That this order shall become effective on November 7, 2004.

3. That this case may be closed on November 8, 2004.

Murray, Davis and Appling, CC., concur

Gaw, Ch., dissents, with dissent to follow

Clayton, C., absent

Mills, Deputy Chief Regulatory Law Judge

Dissenting Opinion of Chairman Steve Gaw

I respectfully dissent from the Order Approving Tariff issued by the majority in this proceeding. I believe that a sufficient issue exists as to Panhandle Eastern Pipe Line Company's continued willingness to provide burner tip balancing for

natural gas transportation customers. In light of this uncertainty, I would have suspended this tariff and established a procedural schedule in order to allow the parties to introduce evidence on this issue.

**In the Matter of the Joint Application of Union Electric Company
and the Board of Municipal Utilities of the City of Sikeston
for an Order Authorizing the Transfer of Certain Customers.**

*Case No. EO-2005-0022
Decided October 28, 2004*

Electric §13. The Commission approved the transfer of three customers from Union Electric Company d/b/a AmerenUE to the Board of Municipal Utilities of the City of Sikeston.

ORDER APPROVING THE TRANSFER OF CUSTOMERS

Syllabus: This order approves, under Section 393.106, RSMo 2000, the transfer of three customers from Union Electric Company, d/b/a AmerenUE, to the Board of Municipal Utilities of the City of Sikeston.

Procedural History

Union Electric Company, d/b/a AmerenUE and the Board of Municipal Utilities of the City of Sikeston filed with the Missouri Public Service Commission an application seeking Commission approval to transfer three customers from AmerenUE to the City of Sikeston. The Staff of the Commission filed on September 17, 2004, its memorandum recommending that the Commission approve the application. On September 22, 2004, the Commission directed its Staff to file a pleading addressing certain language in the application. The Commission was concerned about the Applicants' request for an order: (1) "relieving AmerenUE and its assigns and affiliates of any duties, obligations or conditions which may have been imposed previously by law or by the Commission with respect to [1901, 1905 and 2011 N. Main Street in Sikeston]"; and, (2) "authorizing AmerenUE to enter into, execute, and perform in accordance with the terms of all other documents reasonable necessary and incidental to the performance of the transactions which are the subject of this Joint Application". Staff filed its pleading on October 7, 2004. No party responded.

The Application

AmerenUE is a Missouri corporation and the City of Sikeston is a third-class city under the provisions of the Missouri Constitution. Applicants state that transformers owned by Sikeston are currently serving three customers located at 1901, 1905 and 2011 N. Main Street, Sikeston, Missouri. AmerenUE provides the services and meters, reads the meters, calculates the amounts due, bills the customers, then pays Sikeston. Applicants wish to eliminate these steps, permitting Sikeston to have a direct relationship with the customers.

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Applicants state that transferring the three customers, who live in Sikeston, from AmerenUE to Sikeston is in the public interest because the transfer will not result in any reduced level of service. Having done so for many years, Sikeston is able to provide electric service. Furthermore, the three customers have submitted affidavits consenting to the transfer. Lastly, Applicants state that this transfer would eliminate a complicated billing process and that the customers will see a decrease in their electric rates.

Applicants request that the Commission issue an order:

- (1) authorizing AmerenUE to transfer the electric service for 1901, 1905 and 2011 N. Main Street to the City of Sikeston.
- (2) relieving AmerenUE and its assigns and affiliates of any duties, obligation or conditions which may have been imposed previously by law or by the Commission with respect to 1901, 1905 and 2011 N. Main Street.
- (3) authorizing AmerenUE to enter into, execute, and perform in accordance with the terms of all other documents reasonably necessary and incidental to the performance of the transactions that are the subject of this Joint Application; and,
- (4) granting such other relief as deemed necessary to accomplish the Joint Application and to consummate the transfer of the structures.

Staff Memorandum

Staff states that the request to transfer the customers is in the public interest and is for a reason other than a rate differential and recommends that the Commission approve the application. In its memorandum, Staff informs the Commission that in order to meet the needs of the City's customers located on North Main Street (the same street the customers at issue live on) the City installed upgraded distribution facilities that required removal of AmerenUE's facilities. The upgraded facilities were capable of serving the City's customers as well as 27 customers, located along North Main Street, belonging to AmerenUE. The City therefore agreed to provide electricity and distribution facilities to those 27 customers, while AmerenUE continued to provide all other electrical services to the customers. Although only three of the 27 customers have consented to their provider being changed to the City, it is expected that some, if not all, of the remaining 24 will do the same.

Staff also points out that although the service drops (the wires extending from the transformers to the meters) to three customers will be transferred to the City, the meters will be retained by AmerenUE. The service drops total about 140 feet. Because the service drops will have little, if any, value after AmerenUE removes its meters, Staff takes no position on the recording of the retirement of those assets on AmerenUE's books. Staff does, however, suggest that the Commission explicitly recognize AmerenUE's transfer of the service drops to the City.

Staff opines that it is in the public interest for the Commission to authorize the change of the electric supplier and that the Applicants have requested this change for reasons other than a rate differential. A change in electric supplier will allow Sikeston to serve the customers directly, rather than AmerenUE being the "middle-man." Currently, Staff adds, AmerenUE must consult with the City when any service issues arise. Since the City owns the facilities and the customers are located in the City, it is logical for the City to serve these customers. And, because the billing process will be simplified, the three customers will see a decrease in their electric bills.

Staff's October 7, 2004, filing

In response to the Commission's Order Directing Filing, Staff pointed out that the Applicants' request for an Order: (1) "relieving AmerenUE and its assigns and affiliates of any duties and obligations or conditions which may have been imposed previously by law or by the Commission with respect to the structures [at 1901, 1905 and 2011 N. Main Street, Sikeston, Missouri]"; and, (2) "authorizing AmerenUE to enter into, execute, and perform in accordance with the terms of all other documents reasonable necessary and incidental to the performance of the transactions which are the subject of this Joint Application," is overbroad and lacks specificity. Staff compared this matter to a separate Commission matter; Case No. EO-2004-0108.

In Case No. EO-2004-0108, AmerenUE sought authorization to transfer assets. In its request, AmerenUE sought an order: (1) "authorizing [it] to enter into, execute and perform in accordance with the terms of all other documents reasonably necessary and incidental to the performance of the transactions which are the subject of the form of the Asset Transfer Agreement and this Application;" and, (2) "granting such other relief as deemed necessary to accomplish the purposes of the Asset Transfer Agreement and this Application and to consummate the sale, transfer and assignment of the assets and related transactions." In its Report and Order, the Commission authorized the parties "to take such other lawful actions as may be reasonably necessary to consummate the transaction herein authorized." Staff suggests that unless the Applicants in the present matter are more specific regarding the relief they seek, that the Commission grant relief that is similar to the language in Case No. EO-2004-0108.

Discussion

Section 393.106.2 states that the Commission may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential. The Commission finds that it is in the public interest for the three customers now being served by AmerenUE to be transferred to the City of Sikeston. As suggested by its Staff, the Commission also recognizes that the transfer will include the service drops serving the three customers. Although those customers will experience a decrease in the amount they are billed, the reason for the change is not for a rate differential.

On October 7, 2004, Staff filed its response to the Commission concerns regarding the overbroad relief sought by Applicants. Staff suggested that if Applicants did not submit more specific language, then the Commission should adopt language that is similar to that adopted in Case No. EO-2004-0108.

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Commission rule 4 CSR 240-2.080(15) requires that responsive pleadings be filed with ten days. No party has responded to Staff's pleading. Therefore, the Commission will issue this order consistent with Staff's suggestion.

Conclusion

The Commission finds that a change of supplier is in the public interest and the requested change is for a reason other than a rate differential. The Commission will therefore grant the requested relief.

Additionally, Applicants have requested that the Commission issued an order: (1) relieving AmerenUE and its assigns and affiliates of any duties, obligation or conditions which may have been imposed previously by law or by the Commission with respect to the relevant properties; and (2) authorize AmerenUE to enter into, execute, and perform in accordance with the terms of all other documents reasonably necessary and incidental to the performance of the transactions which are the subject of this Joint Application.

Staff suggested that if the Applicants did not submit more specific language in this regard, then the Commission should adopt language similar to the following: "That AmerenUE and the City of Sikeston are authorized to take such other lawful action as may be reasonable necessary to consummate the transaction herein authorized." The Applicants did not respond to Staff's suggestion. The Commission will therefore adopt this language.

IT IS THEREFORE ORDERED:

1. That Union Electric Company, d/b/a AmerenUE is authorized to transfer electric service for the following structures to the Board of Municipal Utilities of the City of Sikeston:

1901 N. Main Street, Sikeston, Missouri
1905 N. Main Street, Sikeston, Missouri
2011 N. Main Street, Sikeston, Missouri

2. That Union Electric Company, d/b/a AmerenUE and the City of Sikeston are authorized to take such other lawful actions as may be reasonably necessary to consummate the transaction herein authorized.

3. That this order shall become effective on November 7, 2004.

4. That this case may be closed on November 8, 2004.

Gaw, Ch., Murray, Davis, and
Appling, CC., concur.
Clayton, C., absent.

Jones, Regulatory Law Judge

**In the Matter of the Adequacy of Laclede Gas Company's
Service Line Replacement Program and Leak Survey Pro-
cedures.***

*Case No. GO-99-155
Decided October 28, 2004*

Gas §1. The Commission directed Laclede Gas Company to continue the requirements of the previously approved stipulation and agreement, with annual reporting from Staff to the Commission.

Gas §11. The Commission directed Laclede Gas Company to continue to conduct an annual bar-hole leak survey of direct-buried copper service lines.

Gas §35. The Commission directed Laclede Gas Company to continue to conduct an annual bar-hole leak survey of direct-buried copper service lines.

The Commission also directed that the requirements in the previously approved stipulation and agreement, which call for Class 3 leaks in Pressure Region I to be repaired within six months and Class 3 leaks in Pressure Region II to be repaired within one year, be continued.

Finally, the Commission directed that the annual requirement of 8,000 direct-buried copper service line replacements be maintained by Laclede Gas Company.

**ORDER CONTINUING REQUIREMENTS OF
UNANIMOUS STIPULATION AND AGREEMENT**

Syllabus:

This order approves the Staff of the Commission's recommendation that the Commission continue the current requirements of the previously approved Stipulation and Agreement, with annual reporting from Staff to the Commission.

Background:

The Commission opened this case on October 30, 1998, as a general investigatory case to receive information relevant to the adequacy of Laclede Gas Company's direct-buried copper service line replacement program and the effectiveness of Laclede's leak survey procedures.¹ On February 18, 2000, Laclede, Staff, and the Office of the Public Counsel filed a Unanimous Stipulation and Agreement. As part of the Agreement, Laclede agreed to submit annual reports to Staff detailing direct-buried copper service line renewals and relays² completed, and agreed to submit additional reports confirming the achievement of other milestones under the Agreement. The Agreement provided that after the third year

* See page 134, Volume 9, MPSC 3d, and page 400, Volume 12, MPSC 3d, for other orders in this case.

¹ Staff's investigation into the Pralle Lane (Case No. GS-98- 422) and Bergerac Drive (Case No. GS-98-423) natural gas incidents led to Staff filing, on October 14, 1998, a motion to open this case.

² As used in this order, the term "renewal" refers to a main to meter replacement of a service line and the term "relay" refers to the replacement of a specific segment of a service line.

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of the program, Laclede and Staff would review the progress and results of the program to determine future relay/renewal plans, including the rate of such future actions, and potential modifications to survey techniques and other related matters. On May 18, 2000, the Commission issued an order approving the Unanimous Stipulation and Agreement.

On August 1, 2003, Staff filed its Three-Year Summary Report. Staff requested that the Commission continue the current requirements of the Unanimous Stipulation and Agreement, with annual reporting from Staff. Staff stated that the requirements of the Copper Service Line Replacement Program reflect the overall goals of protecting the public, achieving a substantial number of replacements annually, using effective leak detection methods, and making timely repairs, while also being mindful of ratepayers' costs. Staff suggested that Laclede has met or exceeded the guidelines of the Stipulation and that the crucial goal of public safety is being maintained.

The Commission conducted a limited hearing on December 5, 2003.³ On March 5, 2004, the Commission issued its Report and Order, adopting Staff's recommendation that the Commission continue the current requirements of the previously approved Stipulation and Agreement, with annual reporting from Staff.

Staff's September 1, 2004 Annual Report:

Staff filed its Annual Report on September 1, 2004. Staff states that it has completed an analysis of Laclede's copper service line replacements and bar-hole survey data. Based upon its review, Staff recommends that the Commission continue the current requirements of the Stipulation and Agreement, with continued annual reporting from Staff. Staff's Report contains the following specific recommendations.

1. Bar-hole Leak Surveys

Laclede conducted its 2004 bar hole leak survey during the months of March through July 2004. Laclede personnel conducted a bar-hole leak survey over 10,253 direct-buried copper service lines in Pressure Region I and conducted a bar-hole leak survey over 34,371 direct-buried copper service lines in Pressure Region II, for a total of 44,624 direct-buried copper service line bar hole leak surveys during the 2004 survey. A total of 409 leaks were found during the 2004 bar-hole leak survey, which represents a 0.92 percent leak rate. As reported in Staff's August 2003 Three-Year Summary Report, results from bar-hole leak surveys have shown a downward trend in the actual total number of new leaks discovered on copper service lines. Observations in the fourth year of Laclede's program indicate that this downward trend is continuing with the new leak rate of 0.92 percent, which is an approximate 13 percent decrease from the leakage rates found during the 2003 leak survey.

³ The Commission indicated that the purpose of the hearing was to determine whether Staff's recommendations should be approved without the necessity for further hearings. The Commission also noted that if it does not approve Staff's recommendations, it would establish a procedural schedule.

While the bar-hole method for leak surveying demands more personnel time and effort, it is Staff's opinion that this method is far superior to other methods in the detection of small leaks that previously might have gone undetected. This superior method of leak detection, coupled with conducting the surveys on an annual basis, helps in achieving the program goals of early detection before the leak becomes hazardous and assists in prioritizing replacements. This guideline of the Agreement exceeds the Commission's minimum pipeline safety regulations that require three year leak surveys on most residential service lines.

For these reasons, Staff recommends that Laclede continue to conduct an annual bar-hole leak survey of direct-buried copper service lines.

2. Leak Repairs

Expediting the removal of all leaks found during a bar-hole leak survey prior to conducting the subsequent year's bar-hole leak survey continues to enhance the downward trend in detected leaks during subsequent annual bar-hole leak surveys. In accordance with the Agreement, leaks detected during an annual bar-hole leak survey are required to be repaired within six months of discovery in Pressure Region I and within one year of discovery in Pressure Region II. Laclede continues to exceed the requirements in the Agreement by repairing Class 3 leaks in Pressure Region I within an average time of three months (down from three to four months during the first three years of the program) from discovery and within an average time of seven months (down from seven to nine months during the first three years of the program) from discovery in Pressure Region II. This guideline in the Agreement exceeds the Commission's minimum pipeline safety regulations that require Class 3 leaks to be monitored every six months until repaired (within five years of discovery).

All detected leaks, along with other historical information, are used in a prioritization model for identifying replacement areas in a consistent manner and prioritizing the scheduling of these areas for replacement. Staff noted that it is critical that any upward trends in new leaks on replacement program pipelines be identified promptly, as upward trends can point to the need to refocus efforts to stiffen requirements to meet the program's goals and objectives.

Staff believes that timely repairs of observed leaks prior to the subsequent bar-hole leak survey provides better information to detect any upward trends in leakage rate totals. Therefore, Staff recommends that the requirements in the Agreement (calling for Class 3 leaks in Pressure Region I to be repaired within six months and Class 3 leaks in Pressure Region II to be repaired within one year) be continued.

3. Copper Service Line Replacements

During program year four (the twelve months ending March 1, 2004), Laclede completed a total of 8,264 direct-buried copper service line replacements (main-to-meter). During the first four years of the program, Laclede has completed a total of 33,616 direct-buried copper service line replacements, which represents approximately 43 percent of the program's beginning total qualifying services. Through the end of program year four, Laclede has averaged 8,404 direct-buried copper service line replacements each year, which exceeds the Agreement's criteria of an annual replacement rate of 8,000 direct-buried copper service lines.

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Staff believes that an aggressive annual replacement rate (i.e., ten percent annually), based upon priority, with increased frequencies of leak surveys, continues to be successful and, therefore, recommends that the annual requirement of 8,000 direct-buried copper service line replacements should be maintained at this time. The current results of this portion of the program are a substantial reduction in the number of direct-buried copper service lines and a substantially reduced leakage rate in the lines that remain to be replaced.

Discussion:

The Commission has reviewed Staff's September 2004 Report and finds that Staff's recommendations are reasonable and in the public interest, and should be adopted. The Commission will therefore direct that Laclede shall continue to meet the current requirements of the Stipulation and Agreement, with continued annual reporting from Staff.

IT IS THEREFORE ORDERED:

1. That Staff's recommendation is approved. Until ordered otherwise, Laclede Gas Company shall continue to meet or exceed the current requirements of the Unanimous Stipulation and Agreement.
2. That the Commission's Staff shall continue its annual reporting to the Commission until otherwise ordered. Staff's next annual report shall be filed no later than September 1, 2005, unless otherwise ordered.
3. That this order shall become effective on November 7, 2004.

Murray, Davis, and Appling, CC., concur.

Gaw, Ch., dissents, with separate dissenting opinion to follow.

Clayton, C., absent.

Ruth, Senior Regulatory Law Judge

Dissenting Opinion of Chairman Steve Gaw

I respectfully dissent from the Order Continuing Requirements of Unanimous Stipulation and Agreement issued by the majority in this proceeding. I continue to be concerned that Laclede has not been aggressive enough in its service line replacement program.

In the Matter of an Investigation into the Effects of the Bankruptcy of Telecommunications Carriers in the State of Missouri.

*Case No. TW-2003-0063
Decided November 4, 2004*

Telecommunications § 10. The Commission opened this case in light of the MCI WorldCom, Inc., bankruptcy. The Commission did so, in part, to monitor the bankrupt carriers' ability to serve their customers.

Telecommunications § 23. The Commission closed this case in light of a November 30, 2004 Commission rule that would require certificated carriers to provide bankruptcy information to the Commission.

ORDER CLOSING CASE

The Missouri Public Service Commission opened this case on August 15, 2002, in the wake of the bankruptcy filing by MCI WorldCom, Inc., and almost all of its active, domestic subsidiaries on July 21, 2002.¹ This was reported at the time as the largest single bankruptcy filing in the history of the United States. The Commission opened this non-contested case, first, to monitor the progress of MCI WorldCom through Chapter 11 and, second, to track the increasing number of bankruptcy filings by certificated telecommunications carriers operating in the state of Missouri. These bankruptcies necessarily raised questions as to the ability of the carriers involved to meet their obligations to their customers.

The Commission charged its Staff with principal responsibility for this matter. Staff was directed to compile and maintain a list of bankrupt telecommunications carriers operating in Missouri. For each such carrier, Staff was directed to provide certain specific information. Staff was directed to file a copy of this list in this case and to update it as needed, but not more often than once monthly. During the course of this matter, Staff filed 21 status reports, including its recommendation of September 16, 2004. Several of these reports were accompanied by updates to the list of bankrupt carriers; these documents are publicly available to interested persons over the Internet on the Commission's EFIS system.

The Commission also made MCI WorldCom and its bankrupt subsidiaries parties to this case, directed them to prepare and appear for an on-the-record presentation on October 9, 2002, and further directed the filing of quarterly status

¹ Eight of WorldCom, Inc.'s subsidiaries seeking bankruptcy protection — Intermedia Communications, Inc., TTI National, Inc., Brooks Fiber Communications of Missouri, Inc., MCI WORLDCOM Communications, Inc., MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, LLC, Metropolitan Fiber Systems of St. Louis, Inc., and Teleconnect Long Distance Services & Systems Co., — are certificated to provide telecommunications services in the state of Missouri. Metropolitan Fiber Systems of Kansas City, Missouri, Inc., another WorldCom, Inc., subsidiary that is certificated to provide telecommunications service in the state of Missouri, is not listed in bankruptcy documents.

reports. MCI filed seven quarterly reports and a final report. On April 29, 2004, having emerged from Chapter 11, MCI moved that it and its subsidiaries be dismissed from this case.

The Commission's Staff was also directed, in the order establishing this case, to file its recommendations, if any, for proposed Commission procedures in future telephone corporation bankruptcies within 60 days after the final status report is filed by WorldCom, Inc., and its subsidiaries. On September 16, 2004, Staff filed its Memorandum and Recommendation. Therein, Staff advised the Commission to close this case because a newly promulgated regulation will become effective on November 30, 2004, that requires certificated carriers to provide bankruptcy information to the Commission. Staff states that the "new rule . . . obviates the need for Staff to make mandatory separate filings that contain status updates derived from untimely third party sources within the industry." Staff also belatedly responded to MCI WorldCom's motion for dismissal and recommended that it be granted. Staff further explained that its new rule, in addition to imposing a bankruptcy-reporting requirement on certificated carriers, also "outlines a procedure for transfer of customers and transfer of assets and disposal of telecommunication facilities located at the premises of another telecommunications company."

No other party has responded to Staff's Memorandum and Recommendation and the interval for doing so has passed. The Commission will grant Staff's request and close this case. The closing of this case will necessarily end Staff's obligation to file monthly Status Reports and will also end the obligations of MCI WorldCom and its subsidiaries in this case.

IT IS THEREFORE ORDERED:

1. That this case shall be closed as on November 30, 2004.
2. That this order shall become effective on November 30, 2004.

Gaw, Ch., Murray, Davis, and Appling, CC., concur.
Clayton, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. America's Home Brokers, Inc., Respondent.*

*Case No. MC-2005-0028
Decided November 4, 2004*

Evidence, Practice and Procedure §33. America's Home Brokers, Inc. (AHB) failed to timely file an answer to the complaint filed by the Commission's staff. The Commission issued an order finding AHB in default. AHB filed a motion to set aside the order granting default because counsel was retained late in the period allowed to file an answer. The Commission found America's Home Brokers, Inc. showed good cause and set aside its order granting default.

Manufactured Housing §1. America's Home Brokers, Inc. (AHB) failed to timely file an answer to the complaint filed by the Commission's staff. The Commission issued an order finding AHB in default. AHB filed a motion to set aside the order granting default because counsel was retained late in the period allowed to file an answer. The Commission found America's Home Brokers, Inc. showed good cause and set aside its order granting default.

**ORDER GRANTING MOTION TO SET ASIDE ORDER
GRANTING DEFAULT**

On July 22, 2004, the Director of the Manufactured Housing and Modular Units Program of the Public Service Commission filed a complaint against America's Home Brokers, Inc. In that complaint, Staff alleges, *inter alia*, that America's Home Brokers: failed to properly comply with the setup procedures for a manufactured home dealer and to correct those setup deficiencies within a reasonable amount of time; altered a manufactured home and failed to obtain approval for the alteration; failed to correctly anchor a manufactured home; and failed to correct various code violations as identified in the inspection reports within ninety days after being ordered to do so in writing by an authorized representative of the Commission.

Staff's complaint requests authority, as provided in Section 700.115.2, RSMo 2000, to bring a penalty action in circuit court against America's Home Brokers.

On July 28, the Commission issued a Notice of Complaint that informed America's Home Brokers of Staff's complaint and directed it to file an answer within 30 days of the date of the notice. America's Home Brokers' answer was due no later than August 27. America's Home Brokers did not file an answer, and on September 21 the Commission issued an order finding America's Home Brokers in default.

On September 28, America's Home Brokers timely filed a motion to set aside the order granting default. America's Home Brokers stated that it had retained counsel relatively late in the period allowed to file an answer, and thus was not able to timely file its answer.

* See page 566 for another order in this case.

The Commission's rules (4 CSR 240-2.070(9)) provide that the Commission may set aside its order granting default if it finds good cause to do so. The Commission finds that America's Home Brokers has shown good cause, and will set aside its order of default. The Commission will also set a deadline for the filing of an answer to the complaint, and will schedule a prehearing and a date for the filing of a proposed procedural schedule.

IT IS THEREFORE ORDERED:

1. That the motion to set aside the Commission's Order Granting Default is granted.
2. That America's Home Brokers, Inc., shall file an answer to the Complaint no later than November 12, 2004.
3. That a prehearing conference shall be held on November 23, 2004, beginning at 10:00 a.m. The prehearing conference shall be held at the Commission's office in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, a building that meets accessibility standards of the Americans with Disabilities Act. Any person who needs specific accessibility accommodations may call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or Relay Missouri at 711 prior to the hearing.
4. That the parties shall file a proposed procedural schedule no later than November 30, 2004. The procedural schedule shall include dates for an evidentiary hearing at which all evidence will be adduced; no prefiled testimony will be necessary.
5. That this order shall become effective on November 14, 2004.

Lewis Mills, Deputy Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

**In the Matter of BPS Telephone Company's Election to be
Regulated under Price Cap Regulation as Provided in Sec-
tion 392.245, RSMo 2000.***

*Case No. IO-2004-0597
Decided November 9, 2004*

Certificates §46.3. The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.

Service §31. The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.

Service §45. The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.

Telecommunications §3.3. The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.

Telecommunications §23. The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.

Telecommunications §29. The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.

Telecommunications §47. The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.

* See page 263, Volume 12 MPSC 3d for an order in Case No. IO-2003-0012. This order contains a correction issued by the Commission in an order on November 16, 2004. On November 30, 2004, the Public Service Commission issued an order denying an application for rehearing. This case was appealed to the Cole County Circuit Court (04CV327077).

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APPEARANCES

Sondra B. Morgan, Brydon, Swearngen & England P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Cliff Snodgrass, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Nancy Dippell, Senior Regulatory Law Judge.**

REPORT AND ORDER

Syllabus: This order finds that BPS Telephone Company's notice of election to become a price cap carrier under Section 392.245.2, RSMo 2000,¹ is invalid.

Procedural History

BPS previously notified the Commission of its election to be regulated as a price cap company in Commission Case No. IO-2003-0012. An evidentiary hearing was held before the Commission on February 7, 2003. The Commission issued its Report and Order denying BPS's price cap election on November 14, 2003.

On January 20, 2004, BPS and Missouri State Discount Telephone filed an Application for Approval of Amendment to Resale Agreement Between BPS Telephone and Missouri State Discount Telephone Company. This amendment to the Resale Agreement removed the language found in Paragraph 6.1.1 which the Commission found to be noncompetitive.

On May 28, 2004, BPS notified the Commission that it was again electing to be regulated under the price cap provisions of Section 392.245.2. The Commission issued a Notice of Price Cap Election on June 4, 2004, and set a time for responses to the price cap election.

The Staff of the Missouri Public Service Commission filed a motion requesting that the Commission reject BPS's price cap election. The Office of the Public Counsel also objected to BPS's election.

Prior to BPS's price cap election notice, the Staff filed a Complaint² alleging BPS had been overearning.

On September 2, 2004, the parties filed a Stipulation of Facts in which they adopt the complete record and transcript of Case No. IO-2003-0012. The parties also stipulated that "the Commission may take official notice of its rules, tariffs, orders and any other information contained in a document on file as a public record"³ so long as it is relevant.

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

² *Staff of the Missouri Public Service Commission, Complainant, v. BPS Telephone Company, Respondent*, Case No. TC-2002-1076.

³ *Stipulation of Facts*, para. 6.

Initial briefs of the parties were filed on October 8, 2004, and reply briefs were submitted on October 22, 2004.

Discussion

Because the parties stipulated to the facts of this case and adopted the record of the original BPS price cap case, the only issue for determination is whether BPS meets the qualifications for price cap election as set out in Section 392.245.2, RSMo.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The Commission takes official notice of its official case files, tariffs and other orders cited herein. The Commission also adopts the record in Case No. IO-2003-0012. The Commission finds that the facts have not materially changed since the evidentiary hearing in Case No. IO-2003-0012 except as noted in this order.⁴

BPS is a small incumbent local exchange company serving approximately 3900 access lines in Missouri.⁵ BPS provides two-way switched voice service within a local calling scope as determined by the Commission including all the basic local services set out in Section 386.020(4).⁶ BPS provided written notice to the Commission of its intent to be regulated under the price cap statute⁷ on May 28, 2004.⁸

On November 29, 2000, MSDT filed an application for a certificate of service authority to provide basic local telecommunications service. MSDT stated that it would "provide all forms of basic local telecommunications service, including all options and features provided by all incumbent providers"⁹ In the same case, the parties¹⁰ filed a Unanimous Stipulation and Agreement in which MSDT committed to "comply with section 392.451 and provide the 'essential local

⁴ *Stipulation*, para. 5.

⁵ Exh. 1, pp. 3-4; Exh. 2, p. 4; Exh. 3, p.2 ; Tr. 118; 241. (Cites to Exhibits and Transcripts are to those found in Case No. IO-2003-0012 unless otherwise noted.)

⁶ BPS Telephone Company, PSC MO. NO. 1.

⁷ Section 392.245, RSMo.

⁸ *Stipulation*, para. 4.

⁹ *Application for Certificate of Service Authority for Competitive Classification*, Case No. TA-2001-334, filed Nov. 29, 2000, para. 4.

¹⁰ MSDT, the Office of the Public Counsel, the Staff of the Commission, the Missouri Independent Telephone Group, and the Small Telephone Company Group. The last two parties consist of substantially all of the small telephone companies in Missouri.

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telecommunications services' listed in 4 CSR 240-31.010(5).¹¹ In its order granting MSDT a certificate, the Commission approved the Stipulation and Agreement, noted that MSDT agreed to provide all the essential services in 4 CSR 240-31.010(5), and found that MSDT met "the statutory requirements for [the] provision of basic local telecommunications services and has agreed to abide by those requirements in the future."¹² Also, in the order granting MSDT a certificate, the Commission specifically made MSDT's certificate subject to "the conditions of certification set out above and to all applicable statutes and Commission rules except as specified in this order."¹³

MSDT's tariff for the provision of basic local telecommunications service was approved by the Commission on June 26, 2001, and became effective on July 2, 2001.¹⁴ MSDT's original tariff did not specifically list that it would be providing service in any of BPS's exchanges. MSDT amended its tariff effective June 21, 2002, to include the service territory of several small company exchanges including BPS.

MSDT resells the telecommunications service of BPS. BPS and MSDT entered into a Resale Agreement that was approved by the Commission in Case No. TO-2002-62, effective October 26, 2001.¹⁵ BPS and MSDT have since amended their interconnection agreement to remove the language restricting MSDT from targeting BPS's customers.¹⁶ The Commission refers to Section 6.1.1 of the Resale Agreement as the "noncompete clause."

MSDT provides telecommunications service to a few customers within the BPS service area.¹⁷ MSDT provides service by reselling through its interconnection agreement, the services of BPS. The type of service offered by MSDT is often referred to as "prepaid" service. This term is derived from the fact that in order to receive service, the customer must pay in full for the month of service. In addition, consumers of "prepaid" service usually are limited to basic local services and have no access to toll or fee services. MSDT's customers are restricted in this manner.¹⁸ None of BPS's "customers, other than those disconnected for nonpayment, have migrated to MSDT since the removal of the [noncompete clause]."¹⁹ There has also "been no material change in MSDT's advertising,"²⁰ marketing, or business methods since the Commission heard the original BPS price cap case.

¹¹ *Unanimous Stipulation and Agreement*, Case No. TA-2001-334, filed Feb. 28 2001, para. 1.

¹² *Order Granting Certificate*, Case No. TA-2001-334, para. D.

¹³ *Id.*, Ordered para. 2.

¹⁴ Exh. 1, p. 4.

¹⁵ Exh. I, p. 4-5 ; Exh. 6.

¹⁶ See, Tariff File No. VT-2004-0-034.

¹⁷ Exh. 1, p. 6; Exh. 3, p. 3; Tr. p. 51, ln. 4-9.

¹⁸ Missouri State Discount Telephone; P.S.C. No. 1, Original Sheet No. 17.

¹⁹ *Stipulation*, para. 5.

²⁰ *Stipulation*, para. 5.

MSDT provides "two-way switched voice service within a local calling scope"²¹ comprised of the following services:²²

- (a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges;
- (b) Access to local emergency services including 911 service, if available;
- (c) Standard intercept service; and
- (d) Standard white pages directory listings.

MSDT does not provide the following services:²³

- (a) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired or speech impaired.
- (b) Access to basic local operator services.
- (c) Access to basic local directory assistance.
- (d) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.
- (e) Equal access in the sense of dialing parity and presubscription among interexchange telecommunications companies for calling within and between local access and transport areas (a.k.a. intraLATA and interLATA presubscription).

MSDT requires a one-time activation fee of \$30 and a monthly recurring charge of \$50 per month.²⁴ For similar services from BPS the local service charge is \$7.00.²⁵ A customer subscribing to BPS basic local service, however, will also receive additional services (such as access to interexchange and operator services) and the total cost of those services is approximately \$20.²⁶

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

²¹ Section 386.020(4), RSMo.

²² Exh. 5, pp. 12-13 ; Tr. pp. 119-21.

²³ *Id.*

²⁴ Missouri State Discount Telephone, P.S.C. No. 1, Original Sheet 18.

²⁵ Tr. p. 42, ln. 2-5.; BPS Telephone Company, PSC No. 1, Section 4, 1st Revised Sheet 17.

²⁶ Tr. p. 67, ln. 1-9.

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BPS is a telecommunications company²⁷ and a public utility.²⁸ BPS is also an incumbent local exchange telecommunications company²⁹ and a small local exchange telecommunications company.³⁰ The Commission has jurisdiction over the services, activities, and rates of BPS under Chapters 386 and 392.

The Commission is authorized to “ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation.”³¹ Section 392.245.2 sets out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statute and states, in pertinent part, that:

A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area

An “alternative local exchange telecommunications company” is defined as “a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service . . . in a specific geographic area.”³² MSDT was certificated to provide basic local telecommunications service in Case No. TA-2001-334, effective March 26, 2001.

A telecommunications company is required to specify in which exchanges it will provide service.³³ As of June 21, 2002, MSDT's tariff specified that it would provide service in BPS's service area. BPS also has provided written notice of its election to be regulated pursuant to the price cap statute on May 28, 2004.

BPS has shown all the required elements of Section 392.245.2 except that MSDT is providing basic local telecommunications service. Even though MSDT provides two way switched voice service within a local calling scope and provides four of the services listed in Section 386.020(4), it is not providing basic local service in a manner that would allow BPS to elect price cap regulation.

Although the Commission has granted MSDT a certificate of service to provide basic local service in BPS's geographic service area, MSDT is not providing that service in BPS's area in accordance with its certificate. In its application seeking certification, MSDT committed to provide those services required to qualify for state

²⁷ Section 386.020(51).

²⁸ Section 386.020(42).

²⁹ Section 386.020(22).

³⁰ Section 386.020(30).

³¹ Section 392.245.1.

³² Section 386.020(1), RSMo.

³³ Section 392.220.1, RSMo. See also, 4 CSR 240-3.545(12)(C) (this rule was formerly 4 CSR 240-30.010(12)(C) but was relocated within the Code of State Regulations effective April 30, 2003).

universal service fund support. The orders granting the certificate to MSDT noted those commitments, and thus MSDT is required by the terms of its certificate to provide all the essential services as set out in the Commission's rules:³⁴

- (6) Essential local telecommunications services. – Two (2)-way switched voice residential service within a local calling scope as determined by the commission, comprised of the following services and their recurring charges:
 - (A) Single line residential service, including Touch-Tone dialing, and any applicable mileage or zone charges;
 - (B) Access to local emergency services including, but not limited to, 911 service established by local authorities;
 - (C) Access to basic local operator services;
 - (D) Access to basic local directory assistance;
 - (E) Standard intercept service;
 - (F) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission (FCC);
 - (G) One (1) standard white pages directory listing; and
 - (H) Toll blocking or toll control for qualifying low-income customers.

When it granted a certificate to MSDT, the Commission was aware that this grant might allow the small ILECs to invoke the price cap statute election. It is for that reason that the Commission demanded that the alternative local exchange carrier offer *all* of the “essential telecommunications services” as defined by the rule. Therefore, the Commission expressly made its grant of service authority to MSDT in the small ILEC territories subject to the condition that it would offer all the essential telecommunications services for universal service purposes. Because MSDT is not providing all of those services, it is not providing basic local services in accordance with the certificates granted by the Commission. Therefore, MSDT does not meet the requirements set out in Section 392.245 as being “certificated to provide basic local telecommunications service and . . . providing such service.”³⁵

In addition to MSDT failing to provide basic local service in accordance with its certificate, the Commission also concludes MSDT is not “providing such service” for the following reasons.

“It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating

³⁴ 4 CSR 240-31.010.

³⁵ In Case No. IO-2002-1083, the Commission ordered its Staff to investigate whether MSDT is complying with the terms of the order granting it a certificate. Case No. TO-2005-0128 has been opened for the purpose of receiving Staff's recommendation.

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the purpose of the legislature.”³⁶ Section 392.245.2 contains no reference to competition; however, the legislature has mandated that every provision in Chapter 392, whether ambiguous or not, be construed with certain principles in mind.³⁷ Section 392.185 states:

The provisions of this chapter shall be construed to:

- (1) Promote universally available and widely affordable telecommunications services;
- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

The nine provisions of Section 392.185 are mandatory and necessarily must guide the Commission in the construction and application of the price cap statute. Section 392.185(6) states that one public policy to be implemented through the construction of Chapter 392 is to “[a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.” Another is “flexible regulation of competitive telecommunications companies and competitive telecommunications services.”³⁸ Price cap regulation, a transitional status between traditional rate-of-return regulation and deregulated competition, permits ratemaking without

³⁶ *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 386 - 387 (Mo. banc 1987). (citations omitted)

³⁷ Section 392.185, RSMo.

³⁸ Section 392.185(5).

the traditional oversight and regulation of the Commission. This is the principal benefit that the legislature intended to confer on qualifying carriers through the price cap statute.

The Commission has examined the price cap statute in the context of the principles set out by the legislature and the entire deregulation scheme put forth in Chapter 392 to implement the federal Telecommunications Act of 1996. It is clear from the statutes that the legislature intended to promote competition while maintaining protection for the ratepayers by allowing competition to substitute for regulation. The Commission concludes that MSDT is not providing basic local telecommunications services in a manner that would allow BPS to elect price cap status. The Commission further concludes that BPS's price cap election is invalid, and that BPS maintains its status as a traditional rate-of-return regulated company.

The legislature did not intend the presence of a provider of only a few basic local services to trigger price cap regulation. When taken in the context of the entire Chapter 392, competition is a necessary element for the change in regulation to a lesser degree of oversight. For instance, in order to receive a certificate to provide basic local services, Section 392.451.1 requires a competitive company to show that it will "offer *all* telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service fund support."³⁹ The Commission has defined these essential services in its rules.⁴⁰

The Commission is also supported in this interpretation by the statutory distinction between "providing basic local" and "the resale of basic local" found in the certification statutes.⁴¹ Those statutes provide the standards for granting a "certificate of local exchange service authority *to provide* basic local telecommunications service *or for the resale* of basic local telecommunications service."⁴²

The Commission previously rejected this second argument in the *Southwestern Bell* price cap case.⁴³ Southwestern Bell was the first large incumbent local exchange carrier to request price cap status. The *Southwestern Bell* case was appealed to the Circuit Court of Cole County. The Circuit Court affirmed the Commission's decision to grant price cap status but agreed that "it is a possible interpretation" that resellers can be distinguished from facilities-based providers.⁴⁴

Furthermore, a distinction on the facts can be made between the current case and the large ILEC cases. The facts of the *Southwestern Bell* case may be distinguished because the alternative carrier in that case was providing different

³⁹ (emphasis added).

⁴⁰ 4 CSR 240-30.010(6), CSR 240-31.010(6) and 4 CSR 240-32.100.

⁴¹ Section 392.450 and 392.451.

⁴² Section 392.450. (emphasis added).

⁴³ *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price-cap regulation Under Section 392.245 RSMo (1996)*, Case No. TO-97-397.

⁴⁴ *State of Missouri ex rel. Public Counsel v. Public Service Commission, et al.*, Case No. CV197-1795CC, Revised Findings of Fact and Conclusions of Law and Judgment (issued August 6, 1998).

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basic local services including equal access to interexchange services. Also, the focus of the findings in that order is on whether effective competition must exist. In this case, the Commission is not finding that “effective competition” must exist before a company becomes price cap regulated. Instead, the Commission is finding that MSDT does not “provide basic local service” as the statute intends and, therefore, BPS does not meet the statutory requirements to be price cap regulated.

The other large ILEC cases that the Commission has determined can also be distinguished. In the Sprint price cap case,⁴⁵ the alternative carrier was a facilities-based provider. In the only other large ILEC price cap case,⁴⁶ no party alleged that the alternative carrier was not providing service.

MSDT provides only a few basic local services. MSDT is not providing all the essential services and minimum service features required in the Commission rules. They do not provide such basic services as access to local operator services, directory assistance, equal access to interexchange carriers, or assistance programs for economically disadvantaged or disabled customers. At rates that are more than two-and-a-half times the cost of similar residential service from BPS and much more restricted, the services offered by MSDT are in no way a substitute or competitive service to BPS’s customers. The Commission previously found that BPS was “not subject to any competition from MSDT”⁴⁷ and BPS has stipulated that the facts have not materially changed since that decision.

The Commission concludes that to allow BPS to elect price cap status under these circumstances, where prepaid providers offer such minimal services at such a high cost, “would lead to an illogical result defeating the purpose of the legislature”⁴⁸ and would not be “consistent with the public interest.”⁴⁹ The Commission concludes that MSDT is not providing basic local telecommunications services in a manner that would allow BPS to elect price cap status. The Commission further concludes that BPS’s price cap election is invalid, and that BPS maintains its status as a traditional rate-of-return regulated company.

Conclusion

The parties have stipulated to the facts and the only issue for Commission decision is whether the alternative local exchange carrier is providing basic local telecommunication service. The legislature stated that Chapter 392 “shall be construed” so that “full and fair competition . . . [may] substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the

⁴⁵ *In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price-cap regulation Under RSMo Section 392.245 (1996)*, Case No. TO-99-359.

⁴⁶ *In the Matter of the Petition of GTE Midwest Incorporated Regarding Price-cap regulation Under RSMo Section 392.245 (1996)*, Case No. TO-99-294.

⁴⁷ Case No. IO-2003-0012, *Report and Order* (issued Nov. 13, 2003), p. 8.

⁴⁸ *State ex rel. Maryland Heights Fire Protection Dist.*, *supra*.

⁴⁹ Section 392.185(6), RSMo.

public interest."⁵⁰ The types of services that MSDT provides are not what the legislature intended as basic local services necessary to invoke a lesser degree of regulation for small incumbent local exchange carriers. Furthermore, MSDT is not providing all the services it committed to provide in its application seeking certificates, nor is it complying with the conditions placed on the grant of service authority by the Commission. Therefore, it is not providing the service for which it was granted a basic local certificate. For these reasons, the Commission determines that BPS is not eligible for price cap status and that its price cap election is invalid.

IT IS THEREFORE ORDERED:

1. That BPS Telephone Company is ineligible to elect price cap status.
2. That any motion not ruled on is denied and that any objection not ruled on is overruled.
3. That this Report and Order shall become effective on November 19, 2004.

Gaw, Ch., Clayton, C., and Appling, C., concur;
Murray and Davis, CC., dissent.

⁵⁰Id.

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In the Matter of the Joint Application of Missouri-American Water Company, St. Louis County Water Company, d/b/a Missouri-American Water Company, and Jefferson City Water Works Company, d/b/a Missouri-American Water Company, for an Accounting Authority Order Relating to Security Costs.*

*Case No. WO-2002-273
Decided November 10, 2004*

Accounting §4. The Commission found that Sections 393.140(4), (8) give the Commission comprehensive control over public utility accounting.

Accounting §9. Commission Rule 4 CSR 240-50.030(1) requires water corporations to use the Uniform System of Accounts (USOA) issued by the National Association of Regulatory Utility Commissioners (NARUC). The USOA is an accounting system meant to accurately report a business' operation during a specific time.

Accounting §42. An AAO is a Commission-allowed departure from the USOA that allows deferral of costs from one period to another. The Commission's guidepost in determining whether to grant an AAO is whether the event associated with the costs is extraordinary. The USOA defines extraordinary items as items that are not typical or customary.

Water §29. The Commission allowed an AAO for deferring the costs of armed guards, increased water sampling, and computer security following the September 11, 2001 terrorist attacks in America. The Commission mentioned that it had acted similarly during World War II when it allowed rate increases to pay for security measures.

Appearances

Dean L. Cooper, Esq., Brydon, Swearingen & England P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Missouri-American Water Company.

Stuart W. Conrad, Esq., Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209, Kansas City, Missouri 66411, for the St. Joseph Industrial Intervenors.

Jeremiah D. Finnegan, Esq., Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209, Kansas City, Missouri 66411, for the City of Riverside, Missouri.

James B. Deutsch, Esq., and *Marc H. Ellinger, Esq.*, Blitz, Bardgett & Deutsch, 308 East High Street, Suite 301, Jefferson City, Missouri 65101, for the City of Joplin, Missouri.

Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Keith R. Krueger, Deputy General Counsel, Office of the General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Kevin A. Thompson, Deputy Chief.**

* See page 199, Volume 11, MPSC 3d and page 38, Volume 12, MPSC 3d for other orders in this case.

REPORT AND ORDER

Syllabus

On remand from the Circuit Court of Cole County to make more definite findings of fact, the Commission determines that Missouri-American Water Company's request for an Accounting Authority Order permitting deferral of expenditures made to upgrade security following the events of September 11, 2001, should be granted.

Procedural History

On December 10, 2001, Missouri-American Water Company, St. Louis County Water Company and Jefferson City Water Works Company, the latter two doing business as Missouri-American Water Company,¹ filed their joint application for an Accounting Authority Order relating to security costs.² These costs were incurred, the joint application stated, as a direct result of the unexpected and extraordinary events of September 11, 2001. The applicants sought an AAO so that they might recover some part of these costs in a later rate case. The applicants also initially sought expedited treatment so that the order, if granted, would apply to costs incurred during calendar year 2001.³

On December 12, the Office of the Public Counsel filed its response opposing the joint application for an AAO and also opposing the request for expedited treatment. Public Counsel stated that the joint applicants had not alleged facts such as would support an AAO. Public Counsel further stated that expedited treatment was unwarranted because it would obstruct Public Counsel's ability to adequately investigate joint applicants' need for an AAO.

At a prehearing conference on December 17, the City of Joplin appeared by counsel and moved to intervene; no parties objected and the presiding officer granted the motion.⁴ A group of industrial customers of Missouri-American located in St. Joseph, Missouri, AG Processing, Nestle USA, doing business as Friskies Petcare, and Wire Rope Corporation of America, Inc., also appeared by counsel and moved to intervene. Again, no parties objected and the presiding officer granted the motion.⁵ By its order of December 12, the Commission also adopted its standard protective order for this case.

On December 26, the City of Riverside, Missouri, filed its application to Intervene. On January 18, 2002, the Commission issued its Order Granting Intervention

¹ On January 22, 2002, the joint applicants advised the Commission that St. Louis County Water Company and Jefferson City Water Company had merged into Missouri-American Water Company, leaving Missouri-American as the single applicant.

² An Accounting Authority Order is typically referred to in the utility industry as an AAO; this usage will be followed here.

³ The companies originally sought an order by January 4, 2002.

⁴ Counsel for the City of Joplin did not file briefs.

⁵ AG Processing, Nestle USA, d/b/a Friskies Petcare, and Wire Rope Corporation of America, Inc., shall for convenience be referred to as the St. Joseph Industrial Intervenors. These intervenors also filed an application to intervene on December 17.

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and Adopting Procedural Schedule, granting Riverside's application to intervene. The Commission also imposed a procedural schedule on the parties, adopted its standard conditions and shortened the interval set by rule for responses to data requests.⁶

On February 28, Local 335 of the Utility Workers of America, AFL CIO, applied to intervene, stating that it is a labor organization that represents some 300 employees of Missouri-American in two bargaining units. On April 16, the Commission granted Local 335's application to intervene over the objection of Missouri-American. On May 17, Local 335 requested leave to withdraw as a party; this request was granted on June 27.

On March 12, 2002, the Commission denied a motion to dismiss filed by Public Counsel, modified the protective order to permit security-related information to be designated Highly Confidential, and granted a motion to compel filed by Public Counsel.

Pursuant to the procedural schedule, the parties filed direct, rebuttal and surrebuttal testimony, as well as an agreed list of issues, and statements of their positions on each of the issues. The Commission convened an evidentiary hearing on June 27 and 28, 2002. All of the parties were represented at the hearing. The Commission heard testimony from five witnesses and received 15 exhibits.

On July 2, 2002, the Commission issued a briefing schedule as agreed by the parties at the close of the hearing on June 28. This schedule called for the filing of a Late-Filed Exhibit, No. 13, requested by the Commission on July 12; the filing of any objections to that exhibit by July 26; the filing of simultaneous initial briefs on August 15 and the filing of simultaneous reply briefs on August 30.

Late-Filed Exhibit 13 (Highly Confidential) was filed on July 18. No party objected to it and the Commission will receive it into the record of this proceeding.

On August 15, the City of Riverside filed its Agreed Motion to Modify the Briefing Schedule. This pleading explained that the parties had agreed to extend the briefing dates to August 20 and September 4, respectively. Accordingly, all parties filed their initial briefs on August 20 and their reply briefs on September 4.

The Commission issued its Report and Order on December 20, 2002. Certain parties, including AG Processing, Friskies Petcare, Wire Rope, and the City of Riverside, filed timely applications for rehearing. The Commission denied these on January 23, 2003. Thereafter, AG Processing sought judicial review. On February 19, 2004, the Circuit Court of Cole County remanded the case to the Commission "for the agency to complete its work by providing a Report and Order that contains findings of fact and conclusions of law which comply with the Commission's obligations under Sections 386.420 and 536.090." Therefore, in compliance with the order of the Circuit Court of Cole County, Missouri, the Commission issues this Report and Order on Remand.

Discussion

The parties jointly submitted a list of issues for determination by the Commission. Each party also submitted a statement of its position on each issue. In setting out the issues developed by the parties and the parties' stated positions on those

⁶ See Rule 4 CSR 240-2.090.

issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

The issues formulated by the parties are only intelligible in the light of Staff's proposal, presented in the Rebuttal Testimony of Janis E. Fischer, that the Commission adopt in this case four criteria by which to determine whether or not an AAO should be granted, both for purposes of this case and for general application. The four criteria proposed by Staff are as follows:⁷

1. The costs in question must equal or exceed five percent of net income, calculated over the next preceding 12 months and excluding the costs sought to be deferred.
2. Current rates must be inadequate to cover the event.
3. The costs in question must result from either an extraordinary capital addition or an extraordinary event beyond the control of management.
4. There must be satisfactory reasons why the utility cannot file a rate case to recover the costs in question. Alternatively, the utility must file a rate case within 90 days of the granting of the AAO.

The issues formulated by the parties in this case, and their positions on those issues, are as follows:

1. Should the Commission expressly adopt the four criteria proposed by the Staff for this Accounting Authority Order application?

All of the parties except Missouri-American took the position that the Commission should adopt the criteria suggested by Staff.

A. Do Staff's proposed criteria constitute an unlawful change in statewide policy because such change would not be made through a rulemaking proceeding?

Only Missouri-American took the position that the adoption by the Commission in its resolution of this case of Staff's four proposed criteria would constitute a violation of Chapter 536, RSMo.

**B. If the Commission adopts the Staff's four criteria, then:
(1) Are the costs incurred and which are sought to be deferred in this proceeding at least 5% of MAWC's regulated Missouri income, computed before extraordinary items?**

Only Missouri-American asserted that the costs at issue constituted at least five percent of Missouri-American's annual net income.

⁷ Ex. 6, pp. 10-12.

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(2) Are MAWC's current rates inadequate to cover the event (i.e., are MAWC's existing rates sufficient to cover the extraordinary cost and still provide MAWC with a reasonable expectation of earning its authorized rate of return)?

Missouri-American took the position that the answer to this question could not be ascertained. Staff does not contend that MAWC's current rates are adequate to cover the extraordinary event; the other parties asserted that they were.

(3)(a) [Did the expenses result from] an extraordinary capital addition that is required to insure the continuation of safe and adequate service in which unique conditions preclude recovery of these costs through a rate case filing?

Missouri-American asserted that it met both prongs of this criterion. Staff took the position that Missouri-American satisfied one prong but not the other. The other parties contend that Missouri-American did not meet either prong of this test.

(3)(b) [Did the expenses result from] an extraordinary event that is beyond the control of the utility's management?

Missouri-American took the position that the costs in question met this criterion. All of the other parties took the view that the expenditures in question were made by Missouri-American's management under no binding compulsion of any kind.

(4) Is there a sufficient reason why MAWC cannot recover the costs resulting from these expenditures through the normal rate case process?

Missouri-American took no position on this criterion. However, in response to Issue 1.B.(3)(a), Missouri-American pointed out that rate cases deal with prospective costs, not costs already incurred. All of the other parties took the position that Missouri-American was free to file a rate case at any time and that these expenditures, if prudently made within the test year, could be recovered.

C. If the Commission does not adopt Staff's four criteria as requirements to granting an AAO, are the costs incurred by MAWC to increase security measures subsequent to the events of September 11, 2001, "extraordinary, unusual, unique and non recurring"?

Missouri-American asserted that they were; all of the other parties insisted that they were not.

2. In light of the above, should the Commission grant to MAWC an Accounting Authority Order to defer recognition of the costs it incurred and attributed to increased security needs after the terrorist attacks of September 11, 2001, in New York City and Washington, D.C.?

Missouri-American replied "yes" to this question; all of the other parties replied "no."

3. If the Commission grants MAWC an Accounting Authority Order:

A. What conditions, if any, should be reflected in the Commission's order?

Missouri-American argued that no conditions should be placed on any AAO granted in this case. However, should the Commission require Missouri-American to file a new rate case within a certain interval, Missouri-American asserts that the interval should be at least two years. The St. Joseph Industrial Intervenors took no

position on this question. The City of Joplin simply restated its position that no AAO should be granted. Public Counsel suggested that Missouri-American be required to begin amortizing any amount deferred immediately. Staff contended that Missouri-American should be required to file a new rate case within 90 days.

B. Should the Commission make any indications regarding future ratemaking treatment of the deferred expenditures in the Commission's order? If so, what indications should the Commission make?

Missouri-American stated that the Commission should support its security upgrade by committing itself to approving all prudently incurred security expenses and permitting their amortization over a three to five-year period. The other parties argued that the Commission should expressly defer ratemaking treatment to a later case.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises."⁸ Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.⁹ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.¹⁰ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the

⁸ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

⁹ *State ex rel. Laclede Gas Co. v. PSC of Mo.*, 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *State ex rel. Noranda Aluminum, Inc. v. PSC*, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

¹⁰ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

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court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.¹¹

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”¹² Findings of fact are also inadequate that “provide no insight into how controlling issues were resolved” or that are “completely conclusory.”¹³

With these points in mind, the Commission renders the following Findings of Fact.

The Parties:

The Commission finds that Missouri-American Water Company is a Missouri corporation headquartered at 535 North New Ballas Road, St. Louis, Missouri. Missouri-American is in the business of selling drinking water to the public and operates nine separate water systems in the state of Missouri, serving some 418,089 customers.¹⁴

The Staff of the Commission is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to “represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]”¹⁵

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to “represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]”¹⁶

Several parties were permitted to intervene in this matter. The Cities of Joplin and Riverside are Missouri municipalities served by Missouri-American. The St. Joseph Industrial Intervenors are a group of industrial customers of Missouri-American located in St. Joseph, Missouri, including AG Processing, Nestle USA, doing business as Friskies Petcare, and Wire Rope Corporation of America, Inc. Local 335 of the Utility Workers of America, AFL CIO, is a labor organization that represents some 300 employees of Missouri American in two bargaining units.

¹¹ *Id.* (quoting 2 Am.Jur.2d Administrative Law § 455, at 268).

¹² *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting *State ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

¹³ *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *State ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

¹⁴ Although three affiliated entities jointly filed the application under consideration in this case, two of them merged into the third, Missouri-American, as of December 31, 2001. The merger was undertaken pursuant to a standard policy of American Waterworks to operate in each state through a single entity in order to realize various savings and cost efficiencies.

¹⁵ Section 386.071, RSMo 2000. Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 2000.

¹⁶ Sections 386.700 and 386.710.

Why Missouri-American Upgraded its Security:

A terrorist attack on the World Trade Center in New York City, and on the Pentagon in Washington, D.C., occurred on September 11, 2001, resulting in significant loss of life.¹⁷ The federal government, as well as state and local governments, reacted by greatly increasing anti-terrorism and other security precautions with respect to public buildings, public events, and public infrastructure. The federal government also initiated extensive military operations against nations involved in harboring terrorists or otherwise supporting terrorism; these military operations are ongoing. The Commission finds that the United States has effectively been at war since September 11, 2001.

The events of September 11, 2001, caused a greatly increased concern among federal, state and local governmental officials for the security of the nation's public drinking water supplies. In October 2001, officials of St. Louis-area utilities met with the St. Louis County Police Office of Emergency Management, who requested, but did not order, each utility to review its security arrangements and make all possible improvements in order to reduce the effect of a terrorist attack. In November 2001, the National Association of Regulatory Utility Commissioners (NARUC) adopted a resolution urging water utilities "to take all necessary and prudent precautionary steps to secure [their] facilities." In Missouri, Governor Holden appointed the Missouri Security Panel to examine security issues and necessary upgrades; this panel included a Utility Committee.

The Commission finds that the emphasis placed on security by both government and business changed overnight after September 11, 2001. The actions taken by Missouri-American in response to the events of September 11, 2001, were similar to the response of the government of Missouri, which stationed troops at eight regional airports in the state, although no attacks had been made on Missouri soil. Water is not inherently dangerous, like electricity and natural gas, and so water utilities generally had less security in place than did energy utilities prior to September 11, 2001. The perceived threats at that time consisted of vandalism and mischief. During the 1990s, in response to various terrorist acts, St. Louis County Water Company made security improvements commensurate with the level of perceived risk. For example, in response to the 1995 bombing of a federal building in Oklahoma City, St. Louis County Water Company developed a bomb threat response procedure. Since that time, Missouri-American has improved security at its facilities as part of every capital project. However, the testimony was that there is no comparison between threats of terrorist attack and threats of vandalism. Additionally, public drinking water utilities are unique because their product is

¹⁷ Ex. 6, pg. 13. The record does not include a description of the events of September 11, 2001. As these are well-known to all Americans, the Commission will take notice that the events of that day included the hijacking of four commercial airliners, two of which were intentionally crashed into the two towers of the World Trade Center in New York City; another was intentionally crashed into the Pentagon; and the last crashed in Pennsylvania. Many lives were lost in the course of these events and the United States embarked upon a world-wide war on terrorism. See *Staff's Initial Brief* at 4 and 16, for the events of September 11, 2001, and *id.*, at 1 and 17-18, for the nation's response to these events.

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ingested by the public. For these reasons, the Commission finds that a higher level of security became necessary and appropriate once a realistic terrorist threat materialized on September 11, 2001.

The Commission further finds that direct threats to the public water supply were made after September 11, 2001, although Missouri-American did not receive any threat specifically targeting its facilities. The FBI issued an alert in October 2001, regarding a threat to the nation's drinking water. Intelligence indicated that terrorist groups had collected information regarding public water supply systems in the United States. Of particular significance, attacks on public water facilities in Orlando, Florida, and Bridgeport, Connecticut, were thwarted by the authorities in the months following September 11, 2001. In the light of these facts, and having received several advisories from governmental authorities stating that a terrorist threat existed to public water supplies in the United States, the management of Missouri American decided to upgrade and increase the security of its facilities.

Particular Steps Taken By Missouri-American:

The Commission finds that the particular steps taken by Missouri-American to improve the security of its facilities were chosen in consultation with various state and federal agencies, including this Commission and the Federal Bureau of Investigation. Missouri-American consulted with the Local Emergency Planning Commission of St. Louis County, a part of the State Emergency Management Agency, the Missouri Department of Natural Resources, the Missouri Highway Patrol, and the Governor's Special Advisor for Homeland Security. The steps taken by Missouri-American are consistent with the "best practices" list posted by this Commission on its website. Missouri-American took these steps although it had suffered no damage in the events of September 11, 2001. Likewise, no governmental entity ever directly ordered Missouri-American to upgrade its security, although the various agencies it consulted strongly encouraged the company to do so.

Among the particular steps taken by Missouri-American was the provision of armed guards at some facilities. The company also undertook increased water sampling. Missouri-American also took steps to protect its computer network from attack. The costs of these items represented expenses rather than capital investments. By July 2002, about 70 percent of the new security measures planned by Missouri-American were in place, including physical barriers and general "hardening" of the facilities. Other measures, such as cameras and detection devices, remained to be installed. All of the work was expected to be completed by August 2002. In St. Joseph, Missouri, most of the expenditures made were intended to increase security at existing system components, such as tanks and mains, rather than to enhance security at the new water treatment plant.

The Commission finds that Missouri-American's planned expenditures to upgrade security consist of one-time capital additions, one-time non-capital costs and recurring costs. If the requested AAO is not granted, Missouri-American will not recover any of the amounts expended for one time, non-capital costs or recurring costs. Additionally, Missouri-American would also lose depreciation expenses and carrying costs on the new capital assets until such time as they are added to rate base. Federal funds for security upgrades may be available through the

Environmental Protection Agency; however, Missouri-American had not yet applied for such funds at the time of the hearing in this matter.

The Commission finds that Missouri-American was earning 11.0 to 11.2 percent as of December 31, 2001. Missouri-American's earnings for the year ending December 31, 2001, were \$22.38 million. Officers of Missouri-American testified that the utility planned to file a rate case in June 2003.¹⁸ The water industry in general is a rising cost industry, particularly in areas like St. Louis in which large amounts of aging infrastructure must be replaced. Such increased costs could well exceed any savings realized from Missouri-American's recent merger.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Missouri-American pursuant to Section 386.250 and Chapter 393.

Burden of Proof:

Missouri-American, which is seeking an order authorizing a deviation from otherwise mandatory accounting rules, necessarily has the burden of proof.

Public Utility Accounting and the Scope of the Commission's Authority:

This is a case about accounting. "Accounting" in the most basic sense is "[t]he bookkeeping methods involved in making a financial record of business transactions and in the preparation of statements concerning the assets, liabilities, and operating results of a business."¹⁹ Accounting is central to the Commission's statutory duty: "Regulatory accounting is the yardstick by which the commissions can measure and control the various aspects of rate regulation, such as determining the utility's cost of service."²⁰

1. The Statutory Scheme:

It is said that "effective regulation requires commission control of accounting procedures."²¹ To this end, the legislature has granted the Commission broad authority over the accounting practices of regulated utilities. Section 393.140(4) authorizes the Commission to "prescribe uniform methods of keeping accounts, records and books, to be observed by . . . water corporations[.]" Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-50.030(1), which requires water corporations to utilize the Uniform System of Accounts (USOA) issued by the National Association of Regulatory Utility Commissioners (NARUC)

¹⁸ In fact, Missouri-American initiated Case No. WR-2003-0500 by filing tariffs on May 19, 2003.

¹⁹ *The American Heritage Dictionary* 72-73 (2nd College ed.1982).

²⁰ L.S. Pomerantz & J.E. Suelflow, *Allowance for Funds Used During Construction: Theory & Application* (Michigan State University Public Utilities Studies) 8-9 (1975).

²¹ C.F. Phillips, Jr., *The Regulation of Public Utilities: Theory & Practice* 216 (1993).

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in 1973 and revised in July 1976. Another statutory provision, Section 393.140(8), authorizes the Commission “after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.” Taken together, these statutory provisions authorize the Commission both to prescribe the basic organization of a utility’s accounting records and to determine the accounting treatment of any particular transaction. These powers amount to comprehensive control over public utility accounting. As the Missouri Supreme Court put it:²²

we hold here, that the commission’s express statutory power to determine and prescribe just and reasonable rates and to determine what rates will permit a fair return, includes the power to determine what items should be included in a utility’s operating expense and what items should be excluded, and how excluded items, if any, should be handled and treated, in order that the commission may arrive at a reasoned determination of the issue of “just and reasonable” rates.

2. The Uniform System of Accounts (USOA):

The USOA is a comprehensive system of accounts including various assets, liabilities, revenues, and expenses under which the financial transactions of a regulated utility are categorized and recorded. Such uniform prescribed accounting procedures are fundamental in both state and federal regulatory schemes and were developed in response to widespread utility accounting abuses during the late 19th and early 20th centuries.²³ The USOA also includes definitions and instructions, both specific and general, in the use of the various accounts.

One purpose of accounting data is to reliably report the results of business operations during a given period of time. As the Commission has stated, “Costs incurred by the utility during a period are offset against revenues from that same period in determining a company’s profitability.”²⁴ Consequently, the USOA requires that transactions generally be recorded during the period in which they occurred. To that end, USOA General Instruction No. 4 provides, “Each utility shall keep its books on a monthly basis so that for each month all transactions applicable thereto, as nearly as can be ascertained, shall be entered in the books of the utility.” USOA General Instruction No. 7 provides, “It is the intent that net income shall reflect all items of profit and loss during the period” This fundamental accounting principle is often referred to as the “Matching Principle” in that revenues and expenses from the same period are matched.

What is an Accounting Authority Order (AAO)?

An AAO is an order of the Commission pursuant to Section 339.140(8) authorizing an accounting treatment for a transaction or group of transactions other than

²² *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 80 (Mo. 1960).

²³ Phillips, *The Regulation of Public Utilities*, 216-220.

²⁴ *In the Matter of Missouri Public Service Co.*, 1 Mo.P.S.C.3d 200, 203 (Dec. 20, 1991) (“Sibley”).

that prescribed by the USOA.²⁵ It is an accounting mechanism that has most often been used to permit deferral of costs from one period to another.²⁶ The immediate and primary benefit of an AAO to the utility is that the deferred item is booked as a regulatory asset rather than as an expense, thereby improving the financial picture of the utility during the deferral period.²⁷ The regulatory asset is amortized over a prescribed interval and a portion is recognized as an expense each month. A secondary and more remote benefit of an AAO is that, during a subsequent rate case, the Commission may permit recovery in rates of some portion of the amount deferred.²⁸ However, it is well-established that the mere granting of an AAO does not guarantee recovery of any amount of the deferral:

In the *Public Counsel* case, the court made it clear that AAOs are not the same as ratemaking decisions, and that AAOs create no expectation that deferral terms within them will be incorporated or followed in rate application proceedings. The whole idea of AAOs is to defer a final decision on current extraordinary costs until a rate case is in order. At the rate case, the utility is allowed to make a case that the deferred costs should be included, but again there is no authority for the proposition put forth here that the PSC is bound by the AAO terms.²⁹

This Commission has said that AAOs should be used sparingly because they can result in ratemaking consideration of items from outside the test year:³⁰

The deferral of cost from one period to another period for the development of a revenue requirement violates the traditional method of setting rates. Rates are usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate

²⁵ Some of the Commission's AAO orders emphasize that they are issued pursuant to the Commission's authority at Section 393.140(4) rather than Section 393.140(8) and that, consequently, neither notice nor a hearing are necessary before the Commission determines an AAO request. See e.g. *Sibley* at 204. This assertion has not been either approved or rejected by the courts. One court has held that, so long as the Commission did in fact hold a hearing, it doesn't matter which statute the Commission claimed as authority. See *St. ex rel. Missouri Office of the Public Counsel v. Public Service Commission of Missouri*, 858 S.W.2d 806, 812 (Mo. App., W.D. 1993).

²⁶ *Sibley* at 202.

²⁷ *Id.*

²⁸ This benefit exists only where the AAO permits ratemaking consideration of transactions that occurred outside of the test year.

²⁹ *Missouri Gas Energy v. Public Service Commission*, 978 S.W.2d 434, 438 (Mo. App., W.D. 1998) (internal citation omitted), referring to *St. ex rel. Missouri Office of the Public Counsel v. Public Service Commission of Missouri*, 858 S.W.2d 806 (Mo. App., W.D. 1993).

³⁰ *Sibley* at 205, citing *State ex. rel. Union Electric Company v. Public Service Commission*, 765 S.W.2d 618, 622 (Mo. App., W.D. 1988).

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base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.

While the Commission's authority under Section 393.140(8) has been most often used to defer expenses from one period to another, the Commission's authority is not limited to deferral of expenses. The plain language of the statute authorizes the Commission to "prescribe by order" the accounting treatment of both "outlays" and "receipts." In appropriate cases, the Commission has directed that receipts be deferred.³¹

1. The Use of AAOs:

AAOs have often been sought to defer expenses where a utility has undertaken an unusually large construction project.³² In such cases, a primary purpose of the deferral may be to mitigate "regulatory lag."³³ The new asset can be added to rate base only through a traditional rate case, an eleven-month-long process in Missouri, and only after the asset has become used and useful in the public service. However, the USOA requires that expenses associated with the asset – depreciation and the carrying costs of construction financing – be booked from the moment it is placed in service. In such a case, an AAO is often sought in order to defer those expenses until the asset has been added to rate base and revenues associated with the asset become available.³⁴

AAOs have also been granted by this Commission where utilities have incurred expenses due to "Acts of God," such as ice storms;³⁵ to facilitate compliance with changing statutes or regulations, such as the Commission's Cold Weather Rule,³⁶ the Commission's Gas Safety Rules,³⁷ or a new state statute requiring an accounting change with respect to employee benefits;³⁸ and where expenses were incurred in preparing company computer equipment for the year 2000 ("Y2K").³⁹

AAOs are not useful merely for the mitigation of regulatory lag, although that is a proper purpose for an AAO, as the Missouri Court of Appeals has made clear:

³¹ See *In the Matter of Missouri Cities Water Co.*, 28 Mo. P.S.C. (N.S.) 214 (1986); *In the Matter of the Joint Application of Associated Natural Gas Co. and the City of Kennett, Missouri*, 26 Mo. P.S.C. (N.S.) 237 (1983).

³² See *St. ex rel. Missouri Office of the Public Counsel v. Public Service Commission of Missouri*, *supra*.

³³ Regulatory lag is "the lapse of time between a change in revenue requirement and the reflection of that change in rates." *In the Matter of St. Louis County Water Company*, Case No. WR-96-263 (*Report & Order*, issued December 31, 1996), at p. 8.

³⁴ See, e.g., *In the Matter of Missouri-American Water Co.*, 9 Mo.P.S.C.3d 78, 83-85 (2000) (AAO granted with respect to new water treatment plant in St. Joseph, Missouri).

³⁵ *In the Matter of Kansas City Power and Light Co.*, 11 Mo.P.S.C.3d 419 (2002).

³⁶ *In the Matter of Missouri Gas Energy*, 11 Mo.P.S.C.3d 317 (2002).

³⁷ *In the Matter of Missouri Gas Energy*, 3 Mo.P.S.C.3d 201 (1994).

³⁸ *In the Matter of Missouri Gas Energy*, 3 Mo.P.S.C.3d 203 (1994).

³⁹ *In the Matter of Missouri Gas Energy*, 9 Mo.P.S.C.3d 37 (2000).

The Commission has the regulatory authority to grant a form of relief to the utility in the form of an accounting technique, an Accounting Authority Order, (hereinafter called an "AAO") which allows the utility to defer and capitalize certain expenses until the time it files its next rate case. The AAO technique protects the utility from earnings shortfalls and softens the blow which results from extraordinary construction programs.⁴⁰

The AAO is one of the Commission's chief regulatory tools for implementing another aspect of the Matching Principle. As discussed above, one aspect of the Matching Principle is to match revenues and expenses with the period in which they were incurred. However, under another aspect of the Matching Principle, "ratepayers are charged with the costs of producing the service they receive."⁴¹ The purpose is to match costs with benefits so that the ratepayers that enjoy the benefits of utility property also bear the costs thereof.⁴²

An example is the replacement of water mains by a water company. The mains will last for 80-100 years, while the costs of the replacement – in the absence of an AAO – will be booked in the period during which they are incurred. In other words, present customers would bear all of the costs of the replacements, while the benefits would be enjoyed by future generations of customers over the full life of the mains. In that case, an AAO could be used to permit the costs of the main replacements to be spread over the estimated life of the new mains, so that every customer that uses them would pay some portion of their cost.⁴³ This application of the Matching Principle is referred to as "inter-generational equity."

The AAO is also necessary to enable utilities to cope with "extraordinary losses":

Periodically a utility will sustain an unusual or nonrecurring property loss which will not be covered by depreciation, insurance, or other provision. Examples of these losses include storm damage and other acts of God, regulatory requirements, and technological changes. With proper application to the regulatory commission, a utility is allowed to amortize the loss over a period of time. This procedure, while somewhat inconsistent with generally accepted accounting principles, allows the extraordinary item to be spread over a longer period of time, thus reducing the possibility of wide fluctuations in periodic income caused by the nonrecurring item. Since the uniform systems do not provide for the creation of reserves to cover these extraordinary expenses – such a reservation of profit might be open to question – recovery of the loss is always after the fact.⁴⁴

⁴⁰ *Missouri Gas Energy*, *supra*, 978 S.W.2d at 436.

⁴¹ *Town of Norwood v. FERC*, 53 F.3d 377, 381 (D.C. Cir., 1995); and see 1 L.S. Goodman, *The Process of Ratemaking* 285-287 (1998).

⁴² Goodman, *The Process of Ratemaking*, *supra*.

⁴³ See generally *In the Matter of St. Louis County Water Co.*, 10 Mo.P.S.C.3d 56 (2001).

⁴⁴ J.E. Suellflow, *Public Utility Accounting: Theory & Application* (Michigan State University Public Utilities Studies) 209 (1973) (internal footnote omitted).

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The AAO is thus seen as an important and well-recognized regulatory tool:

Most of all, the authority to redirect the cost burden is a powerful tool for creating just and reasonable rates. First, costs incurred in one period can clearly benefit ratepayers over a number of future periods. This is the underlying theory for “capitalizing” a cost and “amortizing” the cost, as well as the theory recognizing the depreciation of an asset over a future period. * * * Second, a change in governmental or financial accounting practice may create a new or enlarged company liability, which cannot reasonably be imposed immediately on current ratepayers. Some distribution of the burden must be considered both as between ratepayer “generations” and as between ratepayers and shareholders.⁴⁵

Through the use of AAOs, the Commission can control the timing of the recognition of expenses and receipts, thereby balancing the interests of the ratepayers and the shareholders as best serves the public interest. This balancing of interests is fundamental to the Commission’s statutory duty: “a fair administration of the act is mandatory. When we say “fair,” we mean fair to the public, and fair to the investors.”⁴⁶

The use of an AAO to mitigate regulatory lag, for example, ensures that shareholders are fully and appropriately compensated for capital investments undertaken to improve service to ratepayers. This use of an AAO serves the public interest by encouraging appropriate capital expenditures. The use of an AAO to match the costs and benefits of long-lived utility assets relieves the burden on current ratepayers who would otherwise subsidize generations yet unborn. This use of an AAO serves the public interest by maintaining intergenerational equity and permitting large projects to go forward while keeping services affordable.

2. The Need for Commission Authorization:

As noted previously, the Commission has by rule adopted the USOA and requires public water utilities such as Missouri-American to comply with it. That regulation, properly promulgated pursuant to the Commission’s statutory authority, has the force and effect of law.⁴⁷ It is binding on Missouri-American and, indeed, on this Commission as well.⁴⁸ The USOA includes Account 186, Miscellaneous Deferred Debits, which it describes as follows:⁴⁹

⁴⁵ Goodman, *The Process of Ratemaking*, *supra*, 286.

⁴⁶ *State ex rel. Washington University et al. v. Public Service Commission et al.*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (*en banc*).

⁴⁷ *State ex rel. Martin-Erb v. Missouri Commission on Human Rights*, 77 S.W.3d 600, 607 (Mo. banc 2002), *citing Missouri National Education Association v. Missouri State Board of Mediation*, 695 S.W.2d 894, 897 (Mo. banc 1985).

⁴⁸ *Id.*

⁴⁹ National Association of Regulatory Utility Commissioners, *Uniform System of Accounts for Class A and B Water Utilities*, 1973 (revised 1976), at 61, paragraph 186.A.

This account shall include all debits not elsewhere provided for, such as miscellaneous work in progress, losses on disposition of property, net of income taxes, deferred by authorization of the Commission, and unusual or extraordinary expenses, not included in other accounts, which are in process of amortization, and items the proper final disposition of which is uncertain.

The Commission's long-standing position is that the USOA authorizes utilities to defer "unusual and extraordinary" expenses without prior permission of the Commission.⁵⁰ For this reason, the Commission has also previously taken the position that, as authority from the Commission in the form of an AAO is not necessary for deferral anyway, the Commission need not hold an evidentiary hearing prior to granting an AAO.⁵¹ The Commission has stated that the only benefit from seeking prior Commission approval for deferring costs is to remove the issue of whether those costs are extraordinary from the case.⁵²

What Standard Governs the Grant of an AAO Permitting the Deferral of Expenses?

The USOA permits the deferral of "unusual and extraordinary" expenses.⁵³ It is important to bear in mind that these words are used in an accounting sense and not in the common sense of "remarkable." The USOA defines "extraordinary items" as "[t]hose items related to the effects of events and transactions which have occurred during the current period and *which are not typical or customary business activities of the company*["]⁵⁴ This definition, adopted by the Commission as part of its regulation, is controlling here. An "unusual and extraordinary" transaction is one that is not typical or customary.

1. The Statutory Standard:

Section 393.140(8), which expressly authorizes AAOs, provides that the Commission shall:

Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation or person, and have power, after hearing, to prescribe by order the accounts

⁵⁰ *State ex rel. Office of the Public Counsel, supra*, 858 S.W.2d at 810 (electric utility); Sibley at 203 (electric utility). The Commission has also taken this position with respect to water utilities, *In the Matter of Missouri-American Water Co.*, 9 Mo.P.S.C.3d 78, 83-85 (2000), and this order was cited by Staff witness Fischer in her Rebuttal Testimony. However, the USOA for water utilities differs somewhat from that applicable to electric utilities and states, at General Instruction No. 7, "Commission approval must be obtained to treat an item as extraordinary."

⁵¹ *Sibley*, at 204.

⁵² *Id.*, at 203-204.

⁵³ National Association of Regulatory Utility Commissioners, *Uniform System of Accounts for Class A and B Water Utilities*, 1973 (revised 1976), at 61, paragraph 186.A.

⁵⁴ *Id.*, at 17, General Instruction No. 7.

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in which particular outlays and receipts shall be entered,
charged or credited.

(Emphasis added.) The statute does not contain any express standard for the exercise of this authority and it is, therefore, committed to the Commission's sound discretion. In reviewing an agency's discretionary decision, the courts consider whether it had a rational basis,⁵⁵ was whimsical, impulsive or unpredictable,⁵⁶ or was oppressive, discriminatory or unwarranted.⁵⁷

2. The Sibley Test:

Under a long-standing test, the Commission has granted AAOs where the expenditures in question are "unusual and nonrecurring, and thus extraordinary."⁵⁸ In the present case, the Commission's Staff has urged the Commission to adopt a new four-part test for AAOs. Staff has taken this position in other recent cases involving AAOs and the Commission has not adopted it.⁵⁹ Missouri-American strenuously opposes Staff's proposal, while the other parties are willing to accept it.

The leading Commission decision on AAOs concerned a large construction project at Missouri Public Service's Sibley Generating Station.⁶⁰ Aquila, then known as Utilicorp United and of whom Missouri Public Service is a division, extensively rebuilt Sibley in order to both extend its life and convert it to the use of low-sulfur, western coal.⁶¹ Also involved were two purchased-power contracts. Aquila sought an AAO in order to defer both costs associated with the Sibley construction project and the purchased power contracts to its next rate case.

In *Sibley*, the Commission noted that it had previously granted AAOs "on a case-by-case basis."⁶² The Commission analyzed AAOs in *Sibley* in terms of their ratemaking effect, that is, the consideration of costs from outside the test year:

Under historical test year ratemaking, costs are rarely considered from earlier than the test year to determine what is a

⁵⁵ *St. ex rel. Division of Transportation v. Sure-Way Transportation, Inc.*, 948 S.W.2d 651, 655 n. 4 (Mo. App., W.D. 1997). An inquiry into the "rational basis" for an agency action

⁵⁶ *Id.*

⁵⁷ *St. ex rel. City of St. Louis v. Public Service Commission*, 47 S.W.2d 102, 104 (Mo. banc 1931).

⁵⁸ *E.g., St. ex rel. Missouri Office of the Public Counsel, supra*, 858 S.W.2d at 811: "The Commission's decision to grant authority to defer the costs associated with the Sibley reconstruction and coal conversion projects . . . was the result of the Commission's determination that the construction projects were unusual and nonrecurring, and therefore, extraordinary. The Commission determined the projects to be unusual because of their size and substantial cost."

⁵⁹ *E.g., In the Matter of Missouri Public Service and St. Joseph Light & Power, Divisions of UtiliCorp United, Inc.*, Case No. GO-2002-175, decided by the Commission on November 14, 2002.

⁶⁰ *Sibley, supra*.

⁶¹ "Missouri Public Service" is a registered fictitious name under which Aquila does business in Missouri.

⁶² *Sibley*, at 204 (punctuation corrected).

reasonable revenue requirement for the future. Deferral of costs from one period to a subsequent rate case causes this consideration and should be allowed only on a limited basis. This limited basis is when events occur during a period which are extraordinary, unusual and unique, and not recurring. These types of events generate costs which require special consideration.⁶³

Such events, the Commission explained, included extraordinary losses, construction projects of unusual size, costs incurred complying with Commission safety requirements, and such other items as nuclear fuel leases, a coal contract buy-out, pension costs, and an automated mapping system.⁶⁴ In fact, in a prior case, the Commission had already permitted the deferral of costs associated with the Sibley rebuild and coal conversion project.

In the *Sibley* decision, the Commission emphasized that it is the extraordinary event that is the "primary focus" in any request for an AAO, considered on a case-by-case basis: "The decision to defer costs associated with an event turns on whether the event is in fact extraordinary and nonrecurring."⁶⁵ The Commission emphasized that "[e]xtraordinary means unusual and nonrecurring."⁶⁶ Also relevant, but not dispositive, the Commission explained, is "whether the event has a material or substantial effect on a utility's earnings."⁶⁷ Another relevant factor is the certainty of the event's occurrence.⁶⁸ "Utilities should not seek deferral of speculative events since it is hard to determine whether an event is extraordinary or material unless there is a high probability of its occurring within the near future."⁶⁹ Finally, the Commission stated that a utility should be required to file a rate case within a reasonable interval after the granting of an AAO, both to preserve the Commission's practical ability to make a disallowance and because, if the event was truly extraordinary, recovery in rates ought not be delayed.⁷⁰

The *Sibley* Commission considered and rejected other factors raised by Staff and by the Company. Thus, whether or not the utility was earning at or above its authorized rate of return at the time of the deferral was not relevant.⁷¹ Also irrelevant were the prudence of the expenditures and the goals of rate stability, avoidance of rate case expense, mitigation of regulatory lag, and maintaining the financial integrity of the utility.⁷² The Commission also rejected the position taken by the

⁶³ *Id.*, at 205 (original paragraph formatting altered).

⁶⁴ *Id.*

⁶⁵ *Id.*, at 205, 206.

⁶⁶ *Id.*, at 207.

⁶⁷ *Id.*, at 206.

⁶⁸ In *Sibley*, the Commission contemplated the grant of AAOs for future events.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, at 206-207. Notice that the Commission's rejection of these purposes is directly contrary to the weight of the academic authorities quoted earlier.

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Public Counsel, who urged the Commission to adopt a standard similar to that used to determine requests for interim rate relief.⁷³ “Public Counsel recommends that the Commission only allow deferral of costs associated with acts of God or when the integrity of the service to customers is threatened.”⁷⁴ The Commission rejected this proposal as “too restrictive.”⁷⁵

3. AAOs Since *Sibley*:

Since it issued the *Sibley* decision in 1991, the Commission has generally used the standard announced therein when analyzing AAO requests. For example, when two divisions of Aquila, Inc., sought to defer uncollectibles associated with compliance with the Commission’s Cold Weather Rule, the Commission stated:⁷⁶

The test that the Commission has used, and continues to use here, for determining whether or not to grant an AAO is whether the expense to be deferred is extraordinary and not recurring[.]
* * * The Commission’s initial inquiry is whether the costs sought to be deferred are indeed extraordinary. If they are not, the inquiry is at an end, and the other questions are moot.

However, the Commission’s adherence to *Sibley* has not been unwavering. In several cases, particularly those resolved by stipulations and agreements, the Commission has instead resorted to a “not detrimental to the public interest” standard.⁷⁷ Thus, in approving an AAO for costs related to storm damage, the Commission stated: “Since the parties are all in agreement that KCPL should be granted an accounting authority order, and are in agreement as to the conditions that should attach to the granting of the authority, the Commission concludes that granting it will not be detrimental to the public interest.”⁷⁸ In a pair of post-*Sibley* cases, the Commission granted deferral on the basis that the requests were “reasonable.”⁷⁹

⁷³ *Id.*, at 204.

⁷⁴ *Id.*, at 207.

⁷⁵ *Id.*, at 208.

⁷⁶ *In the Matter of Missouri Public Service and St. Joseph Light & Power, Divisions of UtiliCorp United, Inc.*, 11 Mo.P.S.C.3d 600, 602-3 (November 14, 2002). The requested AAO was denied on the ground that uncollectibles are a normal cost of doing business.

⁷⁷ By contrast, elsewhere the Commission has applied the *Sibley* standard in cases resolved by stipulation and agreement. See *In the Matter of Laclede Gas Co.*, 3 Mo.P.S.C.3d 135, 138 (August 22, 1994).

⁷⁸ *In the Matter of Kansas City Power & Light Co.*, 11 Mo.P.S.C.3d 419 (July 30, 2002); and see *In the Matter of Missouri Gas Energy*, 11 Mo.P.S.C.3d 317 (June 13, 2002); *In the Matter of UtiliCorp United, Inc.*, 11 Mo.P.S.C.3d 78 (January 10, 2002).

⁷⁹ *In the Matter of Missouri Gas Energy*, 3 Mo.P.S.C.3d 201 (September 28, 1994). The deferral requests were (1) costs and expenditures related to gas safety projects undertaken pursuant to the Commission’s pipeline repair and replacement rules, and (2) to book as regulatory assets certain regulatory assets acquired from Western Resources upon purchase of its system. See also *In the Matter of Missouri Gas Energy*, 3 Mo.P.S.C.3d 203, 205-6 (September 28, 1994): “The Commission finds the current proposal to be a reasonable and prudent mechanism.”

The cases in which the Commission has followed *Sibley* are not entirely consistent. One difficult area has involved successive deferral requests for the same project. In the *Sibley* decision, deferral was granted for costs relating to on-going construction and conversion projects, which had been previously deferred, simply because they had been previously deferred: "The Commission finds that it would be unreasonable to deny deferral of the remainder of the costs associated with this project. The Commission has already found the [life extension] project to be an extraordinary event by allowing deferral of costs associated with the project in Case No. EO-90-114."⁸⁰ Elsewhere, the Commission stated: "The Commission also found the coal conversion project to be an extraordinary event in Case No. EO-90-114. . . . Both projects were treated together and both were found to be extraordinary. The Commission is of the opinion it should not now reverse its prior decision[.]"⁸¹ By contrast, when St. Louis County Water Company sought a third AAO with respect to infrastructure replacement costs, the Commission denied the request, stating:

The record makes it abundantly clear that the Commission should not grant the requested third AAO for infrastructure replacement because the circumstances are recurring, not nonrecurring. The Company has presented ample evidence as to the magnitude of the infrastructure replacement undertaking in terms of cost. However, the record also shows that infrastructure replacement will necessarily continue for years as a series of successive projects. This is not an appropriate case for an AAO.⁸²

Another difficult area has been predictability. The Commission permitted the deferral of costs related to upgrading computers for Y2K compliance, stating that "[a]lthough a finding that an event was unpredictable might support the conclusion that the event was extraordinary, an event can be extraordinary even though it was predictable and foreseeable."⁸³ Previously, however, the Commission had denied the deferral of costs resulting from a mandatory change in accounting methods on the grounds that "UWM's lack of foresight . . . does not justify the issuance of an Accounting Authority Order."⁸⁴

⁸⁰ 1 Mo.P.S.C.3d at 209.

⁸¹ *Id.*, at 210.

⁸² *In the Matter of St. Louis County Water Co.*, 10 Mo.P.S.C.3d 56, 68 (February 13, 2001).

⁸³ *In the Matter of Missouri Gas Energy*, 9 Mo.P.S.C.3d 37, 39 (March 2, 2000).

⁸⁴ *In the Matter of United Water Missouri, Inc.*, 8 Mo.P.S.C.3d 124, 128 (April 20, 1999); see also *In the Matter of St. Louis County Water Co.*, 5 Mo.P.S.C.3d 341, 349 (December 31, 1996): "It is also pointed out that the terms 'infrequent, unusual and extraordinary' connote occurrences which are unpredictable in nature."

⁸⁵ *In the Matter of St. Joseph Light & Power*, 9 Mo.P.S.C.3d 481, 485 (December 14, 2000). Request to defer purchased power expense resulting from a fire and consequent turbine shutdown denied.

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In one case, that has not been followed since, the Commission added a new element to the *Sibley* test:⁸⁵

However, the simple fact that an expense is extraordinary and nonrecurring is not enough to justify the deferral of that expense. Implicit in the Commission's previous orders regarding requests for AAOs is a requirement that there must be some reason why the expense to be deferred could not be immediately included for recovery in a rate case.

In other cases, the Commission has refused to add to the *Sibley* test. Thus, the Commission has stated that the grant of an AAO need not be supported either by a finding that irreparable harm would result were the AAO not granted or by a finding of materiality.⁸⁶ The Commission has reaffirmed that ordinary business expenses are not proper subjects for AAOs.⁸⁷

4. Staff's Proposed Four-Factor Test:

Staff has proposed that the Commission should use this case as an opportunity to adopt a new a four-factor test, as follows:

(1) The amount proposed for deferral must be *material* in that it equals or exceeds five percent of the utility's Missouri regulated annual income, excluding the precipitating event.

(2) The amount proposed for deferral must be of such magnitude that it cannot be covered by current revenue and still permit the utility a reasonable expectation of earning its authorized rate of return.

(3) The amount proposed for deferral must result from an extraordinary event, either an extraordinary capital addition or some event outside of management control, such as a storm or flood.

(4) The utility must show a sufficient reason why it is not immediately filing a rate case to recover the amount to be deferred. Should the Commission grant the AAO, the utility must file a rate case within 90 days.

Staff characterizes its proposed four-factor test as a summary of the criteria examined by the Commission in recent AAO cases, a point that Missouri-American vehemently denies.⁸⁸ Staff urges the Commission to use this test in order to avoid AAO requests that do not reasonably merit consideration; that is, as a way to avoid frivolous requests.⁸⁹ Staff further supports its proposal by stating that its adoption would "establish an ascertainable standard, which would enable utilities to know

⁸⁶ *In the Matter of Missouri Gas Energy*, 9 Mo.P.S.C.3d 37, 39 (irreparable harm), 38 (materiality) (March 2, 2000). For materiality, see also *In the Matter of Missouri Gas Energy*, Case No. GO-99-258 (*Order Regarding Motion to Reject Pleading, Application for Rehearing, and Request for Reconsideration*, issued June 3, 1999), and *Sibley*, 1 Mo.P.S.C.3d at 206.

⁸⁷ *In the Matter of Missouri Public Service and St. Joseph Light & Power, Divisions of UtiliCorp United, Inc.*, 11 Mo.P.S.C.3d 600, 602-3 (November 14, 2002), *supra*, No. 76; *In the Matter of St. Louis County Water Co.*, 4 Mo.P.S.C.3d 94, 98 (September 19, 1995).

⁸⁸ *Missouri-American Water Company's Reply Brief*, at 12 ff.

⁸⁹ Tr. 416, 460-61.

how their application would be judged and would prevent the filing of cases that have little merit [or] . . . little chance of approval.”⁹⁰

Missouri-American argues that the Commission cannot lawfully adopt Staff’s proposed test because, as a rule of general applicability, Chapter 536 requires that it be promulgated as a regulation.⁹¹ The Commission does not have to address this argument unless it adopts the test proposed by Staff.

The Commission has previously considered the components of Staff’s proposed four-part test and, for the most part, has rejected them. Staff’s proposed first factor is materiality. This requirement is drawn from the language of the USOA for electrical utilities, language that does not appear in the USOA for water utilities. The Commission originally stated in the *Sibley* decision, and has restated since, that materiality is a factor for consideration, but it is not determinative.⁹² In other words, while the magnitude of the item proposed for deferral must be considered, that factor alone does not drive the decision.

Staff’s second proposed factor is that the amount proposed for deferral must be of such magnitude that it cannot be covered by current revenue and still permit the utility a reasonable expectation of earning its authorized rate of return. This factor is a mix of the materiality element, already discussed above, and the concept of irreparable harm previously rejected by the Commission.⁹³ Irreparable harm was analyzed in the *Sibley* decision under the heading of “maintaining the financial integrity of the utility.” As the Commission explained in *Sibley*, if the financial condition of the utility is indeed so precarious, its proper remedy is a request for interim rate relief rather than an AAO.⁹⁴ Consequently, this proposed factor is of little use in analyzing an AAO request.

Staff’s third proposed factor is that the amount proposed for deferral must result from an extraordinary event, either an extraordinary capital addition or some event outside of management control, such as a storm or flood. The extraordinary event requirement is, of course, the core of the *Sibley* test. However, Staff has here proposed to modify that requirement by confining extraordinary events to (1) capital projects of unusually large size and (2) unexpected losses due to events outside of management control such as storms and floods.

The Commission does not find Staff’s proposed modification of the *Sibley* test to be helpful. Large capital projects can, indeed, be extraordinary, but they are not necessarily so. That is simply one factor to consider. The Commission has said, in the *Sibley* decision itself and in later decisions, that materiality must be considered. Materiality necessarily embraces the financial magnitude of the item proposed for deferral. As for Staff’s proposed alternative condition, that the event

⁹⁰ Staff’s Reply Brief, at 4.

⁹¹ See *NME Hospitals, Inc. v. Department of Social Services, Division of Medical Services*, 850 S.W.2d 71, 74 (Mo. Banc 1993).

⁹² *Sibley*, 1 Mo.P.S.C.3d at 206; 9 Mo.P.S.C.3d at 38; *In the Matter of Missouri Gas Energy*, Case No. GO-99-258 (Report & Order, issued June 3, 1999).

⁹³ *Supra*, Note 86.

⁹⁴ *Sibley*, 1 Mo.P.S.C.3d at 207.

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be outside of management control, that suggestion is nothing more than the element of predictability, already rejected by this Commission elsewhere.⁹⁵

Staff's fourth proposed factor is the requirement that the utility show why it is not immediately filing a rate case to recover the amount to be deferred. The Commission adopted this factor in a single case, issued in 2000, but it has not applied it since.⁹⁶ In fact, the Commission does not find this factor to be helpful, either.

Deferrals, where granted, have always been time-limited. The order granting the deferral also sets the amortization period over which the regulatory asset is converted into expenses. Thereby, the utility gains the first level of benefit provided by an AAO, which is to spread the extraordinary expense across a number of accounting periods and thus improve the utility's financial picture. This level of relief alone can be of significant importance to the utility, which might otherwise find itself in breach of its bond indentures, for example. None of the deferred amount will be recovered from ratepayers, however, unless it is included in rates. That is the only connection a deferral has with a rate case.

Utilities always seek recovery in rates of expenses deferred under AAOs. Given management's duty to its shareholders, the utility has no choice but to seek recovery. To the extent recovery is not permitted, the shareholders bear the deferred expenses; to the extent recovery is permitted, the ratepayers bear the deferred expenses. This is a rate case issue and it has no place in the analysis of an AAO request because, as the Commission and the courts have repeatedly stated, deferral does not equal recovery in rates. The two inquiries are separate, undertaken at different times, under different standards. For this reason, it is actually immaterial why the utility did not immediately file a rate case to seek recovery of the item proposed for deferral. For the same reason, the Commission will not adopt Staff's suggested requirement that, where a deferral is granted, the company file a rate case within 90 days.

In summary, the Commission will not adopt Staff's proposed four-factor test for analyzing AAO requests. Instead, the Commission will continue to review AAO requests on a case-by-case basis under the *Sibley* standard and will grant them or refuse to grant them according to the particular circumstances of each case.

Is An Accounting Authority Order Appropriate In This Case?

Having reviewed the applicable statutes and its prior cases, the Commission turns now to Missouri-American's request for an AAO relating to security costs. The focus of this inquiry is whether or not the amounts sought to be deferred are indeed extraordinary under the test developed in *Sibley* and its progeny.

1. Wartime Security Expenses

The analysis of the AAO request before the Commission in this case must start with the fact that the nation is now at war. None of the AAO cases discussed above, including the *Sibley* case itself, involved a wartime deferral request. However, this

⁹⁵ *Supra*, Note 83.

⁹⁶ *Supra*, Note 85.

Commission was established in 1913 and it has addressed questions of utility regulation under wartime conditions before.

During World War II, for example, the Commission refused to permit a railroad to abandon an unprofitable branch line.⁹⁷ The Commission reasoned that:

Conditions since Pearl Harbor have changed tremendously.
* * * It is not inconceivable that the result [of the seizure by the Japanese of most of the world's rubber-producing regions] may be to immobilize all privately owned motor vehicles and a large portion of the motor vehicles of motor carriers, passenger and freight, with a consequent great increase of traffic to rail carriers. To grant the application might put the people of the cities of Perry and Center, and tributary area, in the same position relative to transportation as obtained to a lesser number of people in such area in the year 1892 (the year the Branch Line was constructed) and this at a time when they may have the greatest necessity for rail carrier service.

Although this was not a case involving AAOs and the Commission did not use the language of the *Sibley* test, the Commission here recognized that the still-continuing state of war that began with the Japanese attack on Pearl Harbor was an extraordinary circumstance, such that its decision necessarily would be different from the decision it would have rendered in peacetime.

The Commission also considered cases involving significantly increased security costs during World War II. On February 10, 1942, for example, about two months after the attack by Japan upon Pearl Harbor,⁹⁸ the Commission considered a passenger rate increase request for railroads operating in Missouri. The increase was necessary, in part, because increased security expenses due to "the war emergency, will cost approximately \$30,000,000 per year."⁹⁹ The Commission granted the proposed increase.

On March 9, 1942, about a month later, the Commission addressed railroad freight rates. Again, the record showed that an increase was necessary, in part, because of "increases in their operating costs as the result of certain precautionary measures they are taking to safeguard their properties and operations during the continuance of the present war upon recommendation of the War Department."¹⁰⁰ Again, the Commission granted the requested increase.

These cases are quite similar to the present case. The events at Pearl Harbor caused no damage to any Missouri railroad, just as the events of 9-11 caused no damage to Missouri-American. Nonetheless, in 1942, the Commission agreed that increased security-related expenditures of \$30 million were reasonable in

⁹⁷ *In the Matter of the Application of the St. Louis and Hannibal Railroad Co.*, 26 Mo. P.S.C. 184 (September 11, 1942).

⁹⁸ December 7, 1941.

⁹⁹ *In the Matter of the Petition of Railroads for Authority to Increase their Rates, Fares and Charges*, 26 Mo. P.S.C. 37, 38 (February 10, 1942).

¹⁰⁰ *In the Matter of the Petition of Railroads for Authority to Increase their Rates, Fares and Charges*, 26 Mo. P.S.C. 55, 56 (March 9, 1942).

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order to protect Missouri railroads from the possible depredations of the Axis Powers. The security measures implemented by the railroads in 1942 were not ordered by any government agency, but were merely recommended by the War Department, just as various government agencies recommended, but did not order, Missouri-American to implement enhanced security precautions following 9-11.

These cases show that significant increases in security-related expenses are to be expected in wartime and that they are properly recoverable in rates. The present case does not even present the question of recovery in rates, but only the question of deferral.

2. Application of the *Sibley* Test

"The Commission's initial inquiry is whether the costs sought to be deferred are indeed extraordinary. If they are not, the inquiry is at an end, and the other questions are moot."¹⁰¹ As discussed above, the word "extraordinary" is used in its accounting sense and merely means "atypical." In its *Sibley* decision, the Commission added the words "unusual and unique, and non-recurring" as synonyms.¹⁰² The cases show that the necessary extraordinary character can be found either in the transactions themselves, for example, their magnitude, in the event causing the transactions, such as a severe storm or a flood, or in the scope of the disruption avoided by the transactions, such as widespread computer failure due to Y2K noncompliance.

Based on all of the foregoing, the Commission concludes that the items proposed herein for deferral do result from an extraordinary event and are thus deferrable. The extraordinary event was the commencement of a state of war following the attacks of September 11, 2001. Contrary to the contention of the parties opposing this AAO request, the commencement of a state of war is an event that affected every citizen and every utility, including Missouri-American. Additionally, a national state of war is so infrequent as to be unusual, unique and non-recurring within the meaning of the standard announced in *Sibley*.

The Commission further concludes that the public interest supports the deferral of the extraordinary security costs under consideration in this case. As the cases from the 1940s surveyed above indicate, the Commission has traditionally permitted recovery of increased security costs occasioned by the sudden start of a war. Although recovery in rates is not an issue in this case, those cases do support granting the requested deferral. Furthermore, the record shows that the events of September 11, 2001, were closely followed by actual terrorist attempts to interfere with the public drinking water supply. This fact constitutes additional support for the actions taken by Missouri-American and the subsequent request to defer the resulting expenses and costs.

¹⁰¹ *In the Matter of Missouri Public Service and St. Joseph Light & Power, Divisions of UtiliCorp United, Inc.*, 11 Mo.P.S.C.3d 600, 603 (November 14, 2002).

¹⁰² *Sibley*, 1 Mo.P.S.C.3d at 205.

What Conditions Should the Commission Impose on the AAO?

Staff urges the Commission to impose certain conditions if it should grant the AAO requested in this case.

First, Staff urges that Missouri-American be required to begin amortization of the deferred amount immediately upon the effective date of the order granting the AAO. Missouri-American has indicated that this condition is acceptable and the Commission will adopt it.

Second, Staff advises the Commission to leave the determination of the length of the amortization period to a subsequent rate case. Alternatively, should the Commission decide to fix an amortization period in this case, then Staff suggests a ten-year period rather than the 20-year period proposed by Missouri-American. Missouri-American contends that, should an AAO be granted, then the Commission must specify the length of the amortization period. Public Counsel argues for amortization over 20 years rather than ten.

The Commission agrees with Missouri-American that, if amortization is to begin immediately, then the Commission must specify an amortization period. The Commission will adopt Staff's suggestion of a ten-year amortization period, because this will amortize the deferred costs over a period more nearly contemporaneous with the time the ratepayers receive the benefit of the expenditures being amortized.

Third, Staff contends that the Commission should give no indications as to future ratemaking treatment in the order issued in this case. Public Counsel agrees with Staff that the order in this case should include no indications of future ratemaking treatment. In particular, Public Counsel advises the Commission to say nothing as to the prudence of the expenditures involved. The Commission agrees and will adopt these suggestions.

Missouri-American has indicated that it intends to file a rate case in June 2003.¹⁰³ Therefore, the Commission will terminate the AAO granted in this case in September 2003.

IT IS THEREFORE ORDERED:

1. That Late-Filed Exhibit 13 (Highly Confidential), filed by Missouri-American Water Company at the request of the Commission on July 18, 2002, is received and made a part of the record of this proceeding.
2. That the Agreed Motion to Modify Briefing Schedule filed by the City of Riverside, Missouri, on August 15, 2002, is granted.
3. That all other pending motions not already ruled herein are denied.
4. That the application for an Accounting Authority Order filed by Missouri-American Water Company and its predecessors on December 10, 2001, is granted as further specified herein.
5. That Missouri-American Water Company is hereby granted authority to defer and book to Account 186 expenditures relating to security improvements and enhancements beginning September 11, 2001, and continuing through September 11, 2003.

¹⁰³ In fact, Case No. WR-2003-0500 was filed in May, 2003.

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6. That Missouri-American Water Company shall, upon the effective date of this Order, immediately begin the amortization over a ten-year period of any amount deferred under the authority granted in this order.

7. That nothing in this Order shall be considered a finding by the Commission of the value or prudence for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

8. That this Report and Order on Remand shall become effective on November 20, 2004.

Murray, Clayton, Davis, and
Appling, CC., concur.
Gaw, Ch., concurs, with
separate opinion to follow.

**Opinion of Chairman Steve Gaw and
Commissioner Lin Appling Concurring
In Part and Dissenting In Part**

In its Report and Order on Remand, the majority grants Missouri-American Water Company an Accounting Authority Order (AAO) which permits the deferral of expenditures made to upgrade security following the events of September 11, 2001. We agree with the majority to the extent that the AAO is designed to permit deferral of expenditures associated with one-time capital additions and one-time non-capital costs. However, to the extent that the AAO provides for the deferral of recurring costs, primarily increased water sampling, we must dissent.

The analysis provided by the majority serves to confuse whether the issue giving rise to the AAO is an extraordinary event and / or an extraordinary expense. As the Report and Order indicates, the Commission has granted AAOs where an extraordinary event has caused a utility to incur certain expenses. For instance, past Commission decisions have granted AAOs for ice storm damage and the rebuild of an electric generating station. In contrast, other Commission decisions have granted deferral where the expense is extraordinary, for instance the ubiquitous replacement of gas and water mains. This uncertainty regarding the underlying basis for an AAO provides clear indication that the Commission should have taken this opportunity to clarify the current test used for AAO applications.

In the Matter of the Application of Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular, for Designation as a Telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996.*

*Case No. TO-2003-0531
Decided November 30, 2004*

Evidence, Practice and Procedure §26. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC failed to provide the Commission with plans for the use of the federal universal service funds; MMC also failed to provide information detailing how the public would benefit from designating MMC as an eligible telecommunications carrier.

Service §11. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier (ETC) designation for federal universal service funds. If MMC were granted ETC designation, the Commission would have limited power to ensure compliance with rates and service because MMC is a cellular telecommunications company.

Service §15. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier (ETC) designation for federal universal service funds. If MMC were granted ETC designation, the Commission would have limited power to ensure compliance with rates and service because MMC is a cellular telecommunications company.

Service §29. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC did not provide the Commission with specific plans of use of the universal service funds, therefore, the Commission could not determine if MMC would be providing additional services compared to the current plans provided.

Telecommunications §7. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier (ETC) designation for federal universal service funds. If MMC were granted ETC designation, the Commission would have limited power to ensure compliance with rates and service because MMC is a cellular telecommunications company.

Telecommunications §25. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular

* This case was appealed to Cole County Circuit Court (05ACCC00017). In addition, see Volume 12, MPSC 3d page 501 for another in this case.

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(MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC failed to provide the Commission with plans for the use of the federal universal service funds; MMC also failed to provide information detailing how the public would benefit from designating MMC as an eligible telecommunications carrier.

Telecommunications §26. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC did not provide the Commission with specific plans of use of the universal service funds, therefore, the Commission could not determine if MMC would be providing additional services compared to the current plans provided.

Telecommunications §14.1. The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC failed to provide the Commission with plans for the use of the federal universal service funds; MMC also failed to provide information detailing how the public would benefit from designating MMC as an eligible telecommunications carrier.

ORDER DENYING REHEARING AND GRANTING RECONSIDERATION

Syllabus: This order denies Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular's request for rehearing and but grants reconsideration of the Report and Order. The order also denies Mid-Missouri Cellular's request to have the record reopened and strikes Mid-Missouri Cellular's arguments filed on August 26, 2004.

Procedural History

On August 5, 2004, the Commission issued its Report and Order, which became effective on August 15, 2004. On August 13, 2004, Mid-Missouri Cellular filed its timely Petition for Reconsideration and Application for Rehearing. Alma Communications Company, d/b/a Alma Telephone Company, and Citizens Telephone Company of Higginsville, Missouri, filed a response in opposition to the application for rehearing on August 23, 2004.

On August 26, 2004, Mid-Missouri Cellular filed a letter with an attached copy of an order from the Wireline Competition Bureau of the Federal Communications Commission. Spectra Communications Group, LLC, d/b/a CenturyTel, and CenturyTel of Missouri, LLC, objected to the August 26 filing. The August 26 filing was not filed in compliance with the Commission's rules because it is not in the form of a pleading,¹ it does not contain a certificate of service,² and no request for leave of the Commission to file such a pleading was made.³ Mid-Missouri Cellular inappropriately makes further arguments in favor of its application for rehearing in its cover letter. Therefore, the Commission will reject this filing and will not consider it.

¹ 4 CSR 240-2.080(13).

² 4 CSR 240-2.080(19).

³ 4 CSR 240-2.080(20).

The Staff of the Commission filed a Motion for Clarification on October 29, 2004. Staff requests clarification of the Report and Order if the Commission grants ETC status to the company. Because the Commission does not grant Mid-Missouri Cellular ETC status, as explained below, Staff's motion is moot.

Application for Rehearing or Reconsideration

In its application for rehearing, Mid-Missouri Cellular makes several arguments. These arguments are the same arguments that Mid-Missouri Cellular previously asserted in the presentation of its case. Pursuant to Section 386.500, RSMo 2000, the Commission shall grant a rehearing if in its judgment there is sufficient reason to do so. Mid-Missouri Cellular has not provided sufficient reason for the Commission to grant a rehearing, and the Commission will deny the application for rehearing.

In addition to its arguments for rehearing, Mid-Missouri Cellular attempts to supplement the record by including Exhibits I, II, and III, which were not part of the evidence in this case. As an alternative to granting rehearing, Mid-Missouri Cellular asks that the Commission "re-open the record and accept such additional written evidence."⁴

One of the Commission's conclusions was that Mid-Missouri Cellular failed to prove its case by failing to provide sufficient evidence. If the Commission accepted Mid-Missouri Cellular's additional evidence, it would necessarily be required to allow cross-examination of that evidence and an opportunity for the other parties to put on additional rebuttal evidence. Thus, the Commission would be allowing an additional hearing and procedure similar to that of a new application.

Because this is a case of first impression, the Commission has been lenient with Mid-Missouri Cellular's presentation of its application, allowing supplementation of the record throughout the proceeding and even allowing the amendment of the application by the briefs. At some point, however, Mid-Missouri Cellular's opportunity to supplement the record must cease. The Commission finds that to reopen the record would be unduly burdensome and does not allow for finality of the Commission's Report and Order. Therefore, the Commission will deny the request to accept additional evidence or to reopen the record.

Although the Commission will not allow Mid-Missouri Cellular to supplement the record the Commission will grant reconsideration. After reconsidering its decision, the Commission has determined that its Report and Order should be amended to clarify that it has considered the benefit provided by local number portability. In addition, the Commission will clarify why Mid-Missouri Cellular has failed to prove that the grant of ETC status is "consistent with the public interest, convenience, and necessity."⁵ To clarify these issues, the Commission grants reconsideration and adopts the attached Amended Report and Order.

⁴ *Petition for Reconsideration and Application for Rehearing*, p. 25.

⁵ 47 U.S.C. § 214(e)(2).

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IT IS THEREFORE ORDERED:

1. That the cover letter filed on August 26, 2004, by Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular, is rejected.
2. That Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular's application for rehearing is denied.
3. That Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular's request for reconsideration is granted as explained above.
4. That the Commission's Report and Order issued on August 5, 2004, is amended by the additional findings and conclusions made in the attached Amended Report and Order, which is hereby adopted to become effective on December 10, 2004.
5. That this order shall become effective on December 10, 2004.

Clayton, Davis, and Appling, CC., concur.
Gaw, Ch., concurs, with separate concurring
opinion to follow.
Murray, C., dissents.

Dippell, Senior Regulatory Law Judge

CONCURRING OPINION OF CHAIRMAN STEVE GAW

In its Order Denying Rehearing and Granting Reconsideration, the Commission denies Mid-Missouri Cellular's request for rehearing as well as its request to "re-open the record and accept such additional written evidence." As the Commission's Order notes, the Commission has previously allowed Mid-Missouri Cellular to supplement the record and has even permitted the amendment of the application by the briefs. I agree with the Commission that the supplementation of evidence must cease. In the event that Mid-Missouri Cellular wishes to provide additional evidence to support its application, it should file a new application.

I continue to agree with the Commission's initial conclusion that Mid-Missouri Cellular failed to prove its case by failing to provide sufficient evidence. This should not be interpreted as a decision that a Missouri cellular provider could not receive ETC status. In the event that Mid-Missouri Cellular does decide to submit a new application, I would be interested in seeing comparative information regarding: (1) the cost of providing landline rural service versus the cost of providing wireless service to these same customers and (2) the need for USF support relative to the cost of providing service. Furthermore, I would seek some discussion regarding the relevance of this cost information to the Commission's decision.

In the Matter of the Application of Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular, for Designation as a Telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996.

*Case No. TO-2003-0531
Decided November 30, 2004*

APPEARANCES

Paul S. DeFord, Lathrop & Gage, 2345 Grand Boulevard, Kansas City, Missouri 64108, for Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular.

W.R. England, III and *Sondra B. Morgan*, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Alma Communications Company, d/b/a Alma Telephone Company, and Citizens Telephone Company of Higginsville, Missouri.

Charles Brent Stewart, Stewart & Keevil, 4603 John Garry Drive, Suite 11, Columbia, Missouri 65203, for Spectra Communications Group, LLC, d/b/a CenturyTel, and CenturyTel of Missouri, LLC.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102-2230, for the Office of the Public Counsel and the public.

Marc D. Poston, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus: This order finds that Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular should not be granted status as an eligible telecommunications carrier for federal universal service fund purposes.

Procedural History

On June 2, 2003, MMC filed an application for designation as an eligible telecommunications carrier for federal universal service fund purposes under Section 254 of the Telecommunications Act of 1996. MMC is the first wireless service provider to apply for ETC designation with the Commission. MMC sought ETC designation throughout its FCC-licensed service area¹ with respect to all local exchange carrier wire centers where MMC's FCC licensed service area encompasses at least one complete wire center of that LEC.²

¹ Also known as a Cellular Geographic Service Area.

² Tr. p. 134.

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MMC seeks ETC designation in areas served by the rural telephone companies Mid-Missouri Telephone Company, Alma Communications Company d/b/a Alma Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Spectra Communications Group, LLC d/b/a CenturyTel,³ and Sprint Missouri, Inc.⁴ MMC also seeks designation in non rural telephone company areas served by CenturyTel of Missouri, LLC,⁵ and SBC Missouri, Inc., with respect to their wire centers that lie wholly or partially within MMC's FCC licensed service area.⁶

With respect to the areas served by rural telephone companies, the proposed MMC ETC service area includes the entire study area for Alma and Citizens, and a portion of the study areas of Spectra, Mid-Missouri Telephone Company and Sprint. MMC initially requested ETC status throughout Spectra's entire Concordia exchange and for portions of Spectra's Lawson, Braymer, and Kingston exchanges. In its Initial Brief, however, MMC amended its request with respect to Spectra's existing service area to include only Spectra's Concordia exchange.⁷ The Commission finds MMC's Application to be amended accordingly.

Sprint and Sprint Spectrum L.P., d/b/a Sprint PCS, intervened in this proceeding in support of MMC's request for ETC designation. Alma, Citizens, CenturyTel and Spectra intervened in opposition to MMC's request for ETC designation. The Office of Public Counsel withheld judgment on the MMC application until after all evidence was presented. In its Initial Brief, Public Counsel supported the designation as an ETC.

An evidentiary hearing was held on January 28-29, 2004. Neither Sprint nor Sprint PCS participated in the hearing. The parties, with the exception of Sprint and Sprint PCS, later filed Initial Briefs. In addition, all the parties, except Sprint, Sprint PCS, and Public Counsel, filed Reply Briefs and Proposed Findings of Fact and Conclusions of Law. Spectra and CenturyTel filed a motion to file their Proposed Findings of Fact and Conclusions of Law one day out of time. There was no objection to that motion and it will be granted.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

³ Hereinafter referred to as "Spectra."

⁴ Ex. 4, pp. 5-9.

⁵ Hereinafter referred to as "CenturyTel."

⁶ Application for Designation as an Eligible Telecommunications Carrier Pursuant to § 254 of the Telecommunications Act of 1996, Case No. TO-2003-0531, June 2, 2003 (hereinafter referred to as "Application"), at pp. 8-10 and Appendices D and E.

⁷ Initial Brief of Mid-Missouri Cellular, filed March 15, 2004, p. 23.

Mid-Missouri Cellular

MMC is licensed by the Federal Communications Commission to provide commercial mobile radio service to seven rural counties wholly within the state of Missouri, under Federal Communications Commission Call Signs KNKN595 and KNKR207.⁸ MMC is not certificated to provide telecommunications services in Missouri by this Commission.

In its verified application, MMC lists the services that it provides that qualify for universal service fund support.⁹ The Commission finds that MMC is providing all the services required to qualify for universal service fund support.

MMC also states in its verified application that it advertises the availability of its services and the charges for such through media of general distribution within its service territory.¹⁰ The Commission finds that MMC advertises its services through the media of general distribution.

MMC has been providing competitive wireless service since at least 1991. MMC's current service plans, or similar service plans, have been offered within a competitive environment for many years. Six other wireless carriers currently compete with MMC, in addition to the incumbent LECs. MMC provides service to the lower cost portions of its licensed coverage area similar to the nationwide wireless carriers, such as near the interstate highways and larger population centers. MMC also provides service to the more rural areas including population centers like Miami, Gilliam and Pilot Grove, Missouri. MMC will receive approximately \$1.75 million in universal service fund support annually if MMC's request as originally filed is granted.¹¹

Service Offerings of MMC

MMC has provided the Commission with details of two Lifeline-only plans, known as Lifeline and Link-Up, that it will offer throughout its designated ETC service area. In addition, the Lifeline discount will be available on any of MMC's current service plans.¹² MMC suggests that without ETC status, MMC will not be able to offer Lifeline discounts. If granted, MMC will advertise the availability of the supported services and the availability of Lifeline and Linkup services to qualifying customers.

The Lifeline-only plan is intended to provide a low-cost service option comparable in price to that offered by the ILEC.¹³ Lifeline offers unlimited calling and mobility in the area served by the subscriber's home cell site at a fixed monthly price of \$6.25.¹⁴ The subscriber's outbound local calling area would correspond to its traditional local exchange calling area for that subscriber's address. With limited mobility of the wireless service, calls could be originated by the MMC Lifeline

⁸ Application, p. 1 and Appendix D.

⁹ Application, para. 4.

¹⁰ Application, para. 5.

¹¹ Ex. 8, p. 17; Tr. p. 49.

¹² Tr. p. 81.

¹³ Tr. pp. 59 and 157.

¹⁴ Tr. p. 59.

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subscriber to any numbers within that exchange from any location within the subscriber's home cell site serving area, not just from within the subscriber's home. Similarly, the Lifeline customer would receive inbound calls, wherever they originate from, so long as the customer remains within the geographic area served by its home cell site. The area served by a home cell site typically extends to a 10- to 18-mile radius of the home cell site.¹⁵

The second MMC Lifeline-only plan, Link-Up, would allow for local calling and mobility throughout the entire service area for which MMC is designated as an ETC, for a flat \$10.00 per month charge.¹⁶ Since this would be the MMC subscriber's local calling area, even toll-restricted subscribers would have a seven-county mobility and local calling area with the Link-Up plan.

Neither Lifeline nor Link-Up would allow roaming into other cellular networks to place and receive routine calls; however, both plans would allow access to 911 even in a roaming situation.¹⁷

MMC's current rate plans now range from \$19.95 to \$64.95 per month. MMC has not indicated that it will reduce rates if it does become eligible to receive USF, other than to offer the two additional plans and a Lifeline discount as described above.¹⁸ Mr. Dawson testified on behalf of MMC that MMC's Lifeline plan would give qualifying consumers a \$1.75 monthly discount.¹⁹ Mr. Dawson also testified, however, that to initiate service a new Lifeline customer would have to pay a \$30 activation fee except for the most restricted Lifeline plan and would need to purchase a \$45 to \$199 wireless handset.²⁰ So, to benefit from a \$1.75 discount, a low-income customer would need to pay at least \$45, and perhaps \$75 or more just to initiate service.²¹

While the MMC rates appear to be costlier than those charged by Citizens, Alma, and Spectra, the subject level of services are not identical. Each of the current MMC plans includes voice mail, call waiting, call forwarding, three-way calling, and caller ID. Adding the tariff rates for those features to the rates charged by the Intervenor results in monthly rates of \$29.85 for Citizens, \$21.95 for Alma and \$39.06 for Spectra. In addition, the local calling area for those LEC subscribers is limited to the subscriber's local exchange. All calls beyond that limited local calling area result in additional per minute toll charges.

By comparison, the MMC local calling area includes all of the exchanges of not only the Intervenor but also of the other LECs in a seven-county area. Within those calling areas, however, there may be dead spots²² and the possibility of dropped calls.²³ The Intervenor's subscribers receive unlimited local calling compared to

¹⁵ Tr. pp. 59 and 157.

¹⁶ Tr. p. 157.

¹⁷ Ex. 5, p. 7.

¹⁸ Ex. 10, p. 15.

¹⁹ Tr. pp. 59 and 90.

²⁰ Tr. pp. 85-87.

²¹ *Id.*

²² Tr. p. 70.

²³ Tr. p. 127.

a number of “bundled” minutes with which an MMC subscriber can place local or toll calls without incurring charges.

MMC also suggests that it may be able to provide service to some areas at a lower cost than a landline provider. MMC presented evidence that it has already helped Mid-Missouri Telephone Company serve one customer where the landline would have been cost-prohibitive.²⁴ The witnesses testified that MMC is willing to accept carrier-of-last-resort status and there was no evidence that suggested MMC was currently unable to serve the areas where ETC designation is requested. In addition, the MMC witnesses testified that the company would go to whatever lengths were necessary to make certain it could serve, at least within the customer’s home, any customer within its wireless service area. MMC is also ready, willing and able to offer equal access to toll carriers should a customer want to choose such a plan.²⁵

Commitments to Quality of Service

MMC is a member of the Cellular Telecommunications and Internet Association and has committed to complying with the CTIA’s current Consumer Code for Wireless Service.²⁶ Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy.²⁷

In addition to the Consumer Code, Mr. Kurtis testified on behalf of MMC that if a potential customer requests service where the existing service area does not immediately allow MMC to provide service, MMC will take the same steps to provide service as those committed to by Virginia Cellular before the FCC.²⁸ Those steps are as follows: (1) modify or replace the requesting customer’s equipment to provide service; (2) install a roof-mounted antenna or other equipment to provide service; (3) adjust the nearest cell site to provide service; (4) identify and make any other adjustments that can reasonably be made to the network or customer facilities to provide service; and (5) determine the feasibility of installing an additional cell site, cell extender, or repeater to provide service where all other

²⁴ Tr. pp. 97-99.

²⁵ Ex. 5, pp. 8-9.

²⁶ Tr. pp. 128-9.

²⁷ Ex. 12.

²⁸ *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Application for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004) (Virginia Cellular Order).

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options fail. If, after following these steps, MMC still cannot provide the requested service, it will notify the requesting party and include that information in an annual report filed with the Commission detailing how many requests for service were unfulfilled for the past year.²⁹

Mr. Kurtis also testified that MMC would be willing to meet the other conditions agreed to by Virginia Cellular.³⁰

Proposed Upgrade

The MMC network was originally deployed utilizing then state-of-the-art time division multiple access (TDMA) technology. However, that technology is no longer being supported and MMC needs to overlay its entire network with a code division multiple access (CDMA) technology. The specifics regarding the costs associated with that overbuild were provided in highly confidential testimony at the hearing.³¹

The CDMA overbuild, will allow for enhanced voice and data services throughout MMC's market and is also necessary for MMC to meet the FCC accuracy requirements with respect to E-911 Phase II locational services.³² MMC has admitted that it is required by federal law to implement E-911 system improvements regardless of whether this Commission grants MMC's requested ETC status.

MMC provided no specific written plans to the Commission regarding the use of the universal service funds. MMC has failed to provide written documentation of any specific system build-out plans and improvements other than the technology upgrade and has not provided any timetable for implementation of the upgrade.

MMC has admitted that it already provides service throughout its entire licensed service area and that MMC already has an extensive network in place. According to MMC, its existing network is the most extensive wireless network in its licensed service area.

Proposed Service Areas

MMC has requested that it be designated an ETC in rural study areas where Alma, Citizens, Mid-Missouri Telephone Company, Sprint, and Spectra operate. MMC has requested that it be designated an ETC in the non-rural study areas where CenturyTel and SBC Missouri operate. A study area is used to calculate the costs of providing service to a high-cost area for the dispersal of USF funds. In this application, the study areas are the same as the service areas of the rural companies, and the service areas encompass all the exchanges in which the rural companies operate. In addition, each exchange in this case is equal to one wire center.

Each of the intervenor companies are incumbent local exchange companies that provide basic local and other telecommunications services in their respective service areas, as certificated by the Commission and pursuant to Commission approved tariffs. Each is a carrier of last resort and is an ETC providing service to

²⁹ Tr. pp. 142-143.

³⁰ *Id.*

³¹ Tr. pp. 186-187.

³² Tr. pp. 173-175.

the public throughout its respective service areas. No evidence was presented to show that any residents in the service areas of the incumbents are being denied access to the public switched network or service in the incumbents' service areas.³³

MMC requests ETC status throughout the entire rural LEC study areas of Alma and Citizens thus no redefinition of those study areas is requested.³⁴ In addition to MMC, six other commercial mobile radio service carriers currently provide cellular phone service in the service areas of Alma and Citizens.³⁵ The other commercial mobile radio service providers charge rates that are similar to those charged by MMC.³⁶ In the Citizens study area MMC already has a number of lines equal to 22% of what the ILEC has and in the Alma study area that number is equal to 76%.³⁷

Alma's local tariffed rate for residential service is \$6.50. When combined with the \$6.50 federal subscriber line charge, the rate is \$13.00 for basic service.³⁸ Citizens' local tariffed rate for residential service is \$8.40. When combined with the \$6.50 subscriber line charge, a Citizens customer pays \$14.90 for local service.³⁹

MMC requests ETC designation in the entire Concordia wire center. This wire center is a noncontiguous portion of a larger study area.⁴⁰ The MMC licensed service area also encompasses portions of the Braymer, Kingston, and Lawson wire centers.⁴¹ No evidence was presented indicating that any member of the public currently was being denied basic local telecommunications service in Spectra's service area.

Spectra does not disaggregate, keep, or report ETC-related records or line counts below the exchange level. Spectra has disaggregated its study area down to the wire center level.⁴² MMC's request as originally filed would require the incumbent LECs to begin to keep records for partial wire centers and thus would create added administrative burdens and costs to the incumbents where this was to occur. MMC's request for an ETC service area with respect to the area served by Spectra has now been limited to only the Concordia wire center. With this deletion of the partial wire centers from its proposed ETC service area, MMC proposes to serve the entire contiguous portion of the study area within its licensed service area.

By seeking ETC status in only Spectra's Concordia exchange, and not in the remaining portions of Spectra's existing ETC study area, MMC's Application raises the issue of potential cream-skimming. In order to determine whether MMC is engaging in prohibited cream-skimming with respect to Spectra's Concordia exchange, the Commission must look to the factual record before it. The record,

³³ Tr. p. 281.

³⁴ Application, para. 6.

³⁵ Ex. 10, p. 21.

³⁶ Tr. p. 262.

³⁷ Ex. 8, p. 20; Tr. p. 377.

³⁸ Ex. 10, p. 14.

³⁹ Ex. 10, p.14.

⁴⁰ Tr. p. 134.

⁴¹ Application at Appendix D.

⁴² Ex. 9, p. 13.

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however, is silent with respect to existing Spectra universal service fund support levels in the Concordia exchange, the specifics of Spectra's disaggregation plan, and the population density in Spectra's exchanges.

The evidentiary record does, however, indicate that the Concordia exchange is much larger than the other partial Spectra exchanges within MMC's licensed coverage area and that it is located in an already highly competitive area along a major interstate highway, where, according to Mr. Kurtis, other wireless carriers target their marketing and engage in cream-skimming. Accordingly, on this record the Commission is unable to find that no cream-skimming would occur with respect to Spectra's Concordia exchange if MMC's request is granted.

Mid-Missouri Telephone Company is an affiliate of MMC. Mid-Missouri Telephone Company's study area is comprised of three noncontiguous geographic areas. Two of those noncontiguous areas, encompassing nine⁴³ of the twelve Mid-Missouri Telephone Company wire centers, lie wholly within MMC's licensed service area and were included in the proposed MMC ETC service area.⁴⁴ The remainder of the study area is comprised of the Fortuna, Latham and High Point wire centers and is a noncontiguous geographic area that lies wholly beyond MMC's licensed service area.⁴⁵

MMC requests redefinition of Mid-Missouri Telephone Company's service area to include only the nine contiguous wire centers. Mid-Missouri Telephone Company does not object to this redefinition.

MMC has also sought ETC designation coterminous with the following Sprint wire center boundaries: Blackburn, Centerview, Green Ridge, Henrietta, Holden, Houstonia, Lexington, Malta Bend, Odessa, Otterville, Smithton, Sweet Springs, and Warrensburg.⁴⁶ MMC has sought ETC designation for those portions of the following Sprint wire center boundaries that lie within MMC's licensed service area: Blairstown, Calhoun, California, Chilhowee, Clarksburg, Cole Camp, Hardin, Ionia, Kingsville, Leeton, Lone Jack, Norborne, Oak Grove, Strasburg, Syracuse, Tipton, Urich, Waiverly, Wellington and Winsor.⁴⁷ MMC requests that the Commission redefine the service area along the licensed service area boundaries for MMC's system. Sprint has not objected to the redefinition of its service area.

Public Interest

MMC suggests in its Application that granting ETC status to MMC "will enhance consumer welfare by bringing service choices, innovation, quality differentiation and rate competition to the local market."⁴⁸ MMC fails to explain in sufficient detail how these public interest benefits will occur. The only mention of a forward-looking

⁴³ The Gilliam, Bunceton, Speed, Pilot Grove, Marshall Junction, Nelson, Blackwater, Arrow Rock, and Miami wire centers. Application at Appendix D and F.

⁴⁴ Application, p. 13, and Appendix D.

⁴⁵ Application at Appendix D.

⁴⁶ Application at Appendix E.

⁴⁷ Application at Appendix E.

⁴⁸ Application, p. 14-16.

plan is MMC's assertion that it will use universal service fund support to finance construction, maintenance and upgrading of facilities, which would allow MMC to serve remote locations.⁴⁹ However, MMC provided no supporting documentation to substantiate that such remote locations exist, or that these locations are substantial enough to make the ETC grant in the public interest.

MMC claims an ETC grant will bring the benefits of advanced technologies to the remote areas of MMC's service area.⁵⁰ The only advancement in technology discussed in any detail concerned the industry-wide change in platforms from a TDMA platform to a CDMA platform. Mr. Dawson testified for MMC that it would upgrade platforms with or without USF support.⁵¹ Thus, the new technology deployment appears to be inevitable with or without USF support, and does little to support a finding that the ETC designation is in the public interest.

Mr. Kurtis testified that a wireless ETC's provisioning of additional lines to existing ILEC subscribers will expand the availability of innovative, high-quality and reliable telecommunications services.⁵² No evidence was presented, however, indicating how this ETC grant will increase the lines provisioned to existing ILEC subscribers.

MMC's next argument in favor of the ETC grant is that it will bring the benefits of wireless service to the current Lifeline subscribers of the various ILECs.⁵³ MMC suggests that without ETC status, MMC will not be able to offer Lifeline discounts. Mr. Dawson testified that MMC's Lifeline plan would give qualifying consumers a \$1.75 monthly discount.⁵⁴ However, Mr. Dawson also testified that to benefit from a \$1.75 discount, a low-income customer seeking only the Lifeline plan would need to pay for a handset costing at least \$45, and a low-income customer seeking the Link-Up plan would need to pay for a handset and pay an activation fee of up to \$30.⁵⁵ The Commission finds that for low-income customers, the cost of initiating service will erase any benefit that a Lifeline customer would receive through a \$1.75 Lifeline discount.

MMC also argues that local number portability from a landline to MMC's service will be a benefit to Lifeline and Link-Up customers if the ETC status is granted. The Commission finds that local number portability is a potential benefit. The Commission determines, however, that the detriments to granting the designation, discussed below, such as the impact on the Universal Service Fund, the lack of quality-of-service assurances similar to those under which the landline companies must operate, and the substantial costs to Lifeline and Link-Up customers to initiate a cellular service will outweigh the possible benefits including local number portability.

⁴⁹ Application, p. 16.

⁵⁰ Tr., p. 36.

⁵¹ Tr. pp. 86-87.

⁵² Ex. 5, p. 6.

⁵³ Tr. p. 36.

⁵⁴ Tr. p. 59.

⁵⁵ Ex. 1, Attachment 1; Tr. pp. 59 and 85-86.

The Commission finds that MMC has not shown that the benefits to the public of granting MMC ETC status will outweigh the potential detriments. The Commission also agrees with the Office of the Public Counsel that if MMC's request were granted it would be important for the Commission to place reasonable limits on MMC so that the Commission can monitor and ensure that essential telecommunications services are provided in a manner consistent with the protections currently afforded to wireline customers. While MMC has verbally made general system improvement and customer service commitments the record is unclear as to the extent of the Commission's legal authority and practical ability to enforce such commitments if MMC's request is granted.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

SBC Missouri, CenturyTel, Sprint, Mid-Missouri Telephone Company, Spectra, Alma, and Citizens are each a "telecommunications company" and a "public utility" as those terms are defined in Section 386.020, RSMo 2000, and are therefore fully subject to the regulatory jurisdiction of the Commission. Each of the companies is an incumbent local exchange carrier and has been designated as an ETC for purposes of receiving federal USF support.

Spectra, Mid-Missouri Telephone Company, Alma, Citizens, and Sprint are each rural telephone companies as defined by the Federal Telecommunications Act of 1996.

CenturyTel and SBC Missouri are non-rural telephone companies. While not a rural telephone company as defined by the Act, at least two of CenturyTel's four statewide ETC study areas are rural.

The commercial mobile radio service provided by MMC is specifically excluded from the statutory definition of "telecommunications service."⁵⁶ Thus, MMC is not subject to the general regulatory jurisdiction of the Commission. Under the authority granted to the Commission by the FCC, MMC has requested that the Commission designate it as an eligible telecommunications carrier for purposes of receiving federal universal service support.

The purpose of the Universal Service Fund is to provide financial support to carriers that use the support to advance universal service principles. Before a carrier can receive support from the USF, the carrier must be designated as an ETC by the state commission with jurisdiction over the service area where the carrier seeks to apply its USF support.⁵⁷

The state commission must first confirm that the petitioning carrier offers the services that are supported by federal universal service support mechanisms under Section 254(c) of the Act.⁵⁸ Second, the state commission must confirm that the petitioning carrier advertises the availability of such services and charges using

⁵⁶ Section 386.020(53)(c), RSMo.

⁵⁷ 47 U.S.C. § 214(e).

⁵⁸ 47 C.F.R. § 54.101.

media of general distribution.⁵⁹ After making those determinations, the Commission must determine if the request is in the public interest.⁶⁰

Requirements of 47 U.S.C. Section 214(e)(1)

Paragraph (1) of Section 214(e) of the Act requires that an eligible telecommunications carrier:

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefore using media of general distribution.

The Commission has previously found that MMC offers the services that are supported by federal universal service support. The Commission has also found that MMC advertises the availability of those services using media of general distribution. No party contests that MMC meets the requirements for provision of service found in Section 214(e)(1). The Staff and Intervenor only argue that MMC has not proven that the designation would be in the public interest, particularly in the rural service areas. Thus, the Commission concludes that MMC has met the requirements set out in Section 214(e)(1)(A) and (B).

Public Interest Determination

Section 214(e)(2)⁶¹ of the Act, as well as the Federal Communications Commission regulations,⁶² govern the designation of ETC status. Section 214(e)(2) of the Act states, in relevant part:

Upon request and consistent with the public interest, convenience and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Thus, the Commission must determine if the designation of an additional ETC is in the public interest.

⁶⁰ 47 U.S.C. § 214(e)(2).

⁶¹ 47 U.S.C. § 214(e)(2).

⁶² 47 C.F.R. § 54.201, *et seq.*

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This case represents a case of first impression before the Commission with respect to the designation of wireless ETC. This is not, however, a case of first impression with respect to this Commission's grant of ETC status to a non-ILEC carrier in areas served by rural telephone companies.⁶³

At the time the MMC application was originally filed, and during the period of time that written testimony was prepared and filed, the FCC had consistently held that the public interest benefits related to the introduction of competition in rural areas satisfied the public interest mandate of Section 214. As of that point in time, the FCC had never denied or conditioned a wireless ETC application. In the *Green Hills Order*, applying the same statutory provisions at issue in the instant case, the Commission approved a stipulation that found, without testimony or further support that the grant of the requested ETC status in an area served by a rural telephone company was in the public interest.

On the eve of the hearing in this proceeding, the FCC issued an order setting forth additional guidance to be used in conjunction with a public interest finding for competitive ETC designations in areas served by rural telephone companies.⁶⁴ In addition, the FCC has issued an order in the *Highland* case⁶⁵ that helps define the public interest standard. Thus, the current case may be distinguished from the Commission's previous *Green Hills Order* because the FCC has given this additional guidance and specifically "acknowledge[d] the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas."⁶⁶

"With regard to the rural LEC service areas, the FCC found that the benefit of increased competition, while an important objective of the telecommunications policy, might not alone be sufficient to meet the public interest standard."⁶⁷ The FCC states that "[I]n determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant."⁶⁸

In *Virginia Cellular*, the FCC stated that to make the public interest determination, the specific facts should be analyzed to determine

whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, [by weighing]
 . . . the benefits of increased competitive choice, the impact of

⁶³ See, e.g., *Application of Green Hills Area Cellular Telephone, Inc. d/b/a Green Hills Telecommunications Services*, Case No. CO-2003-0162, Order Approving Stipulation and Agreement (adopted March 4, 2003) (*Green Hills Order*).

⁶⁴ *Virginia Cellular*.

⁶⁵ *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. April 12, 2004).

⁶⁶ *Id.* at para. 4.

⁶⁷ Initial Brief of MMC, p. 8.

⁶⁸ *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. April 12, 2004); See also, *Virginia Cellular Order*, at para. 26.

the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.⁶⁹

The FCC recognized that its "Common Carrier Bureau previously found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of Section 214(e)(1) of the Act."⁷⁰ However, in *Virginia Cellular* and *Highland*, the FCC said that an additional ETC was not in the public interest in every instance even in non-rural areas. The FCC did not set out a new standard to follow for non-rural areas, but said that because the company had met the more rigorous test for the rural areas, it must also necessarily meet the test for the non rural areas.

Thus, the Commission will first examine whether MMC has shown that it is in the public interest for it to be designated as an ETC in the rural areas. To determine if the designation is in the public interest, the Commission looks to the factors set out by the FCC.

A. Benefits of Increased Competition

The FCC takes for granted that an increase in competition is in the public interest. This is based on the fact that one of the main goals of the Telecommunications Act of 1996 was to increase competition. Thus, under the FCC's analysis, having MMC designated as an ETC will have some benefit of increasing competitive choice. In the current case, however, the only evidence MMC presented regarding how competition will increase was two new service offerings for Lifeline.

The Commission has found that in the Citizens study area MMC already has a number of lines equal to 22% of what the ILEC has and in the Alma study area that number is equal to 76%.⁷¹ In addition, six other wireless carriers offer services in those same areas. The Commission concludes, based on the record before it, that the benefits to competition of designating MMC an ETC will not be very significant. MMC already has a significant presence in these service territories and the only additional offering MMC has presented to the Commission is its Lifeline programs. The other improvements made by MMC will take place regardless of the designation.

B. Impact on the Universal Service Fund

The second factor that the FCC considered is the impact on the Universal Service Fund. In the *Virginia Cellular* case the impact on the fund was 0.105% of the total high-cost support available to all ETCs.⁷² The impact on the fund of MMC

⁶⁹ *Virginia Cellular*, p. 13, para. 28.

⁷⁰ *Highland*, p. 10, para. 21.

⁷¹ Ex. 8, p. 20; Tr. p. 377.

⁷² 19 FCC Rcd 1563, note 96.

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of \$1,751,721 per year⁷³ is higher at about 0.20%.⁷⁴ The FCC acknowledged that there were concerns about the overall impact of designating multiple carriers, including wireless, as ETCs but left those concerns to be determined in its pending rulemaking.⁷⁵

The Intervenor believe a stricter analysis should be done. The Intervenor suggest that the Commission must look to the Universal Service Principles in Section 254(b) to determine the impact on the USF.⁷⁶ The Intervenor suggest that because the wireless carrier does not have to show that the amount it receives in Universal Service Funds is equal to its costs, like the ILECs must, that the USF principle regarding competitive neutrality is violated.⁷⁷ The Intervenor also believe that the USF will grow too rapidly with the addition of wireless companies.

The Commission is also concerned with the rapid growth of the Universal Service Fund, and eagerly awaits final guidance from the FCC on improvements to the system. The FCC has stated that the state commissions should undergo a stricter public interest analysis before designating a carrier as eligible in the rural areas. Thus, the Commission cannot just ignore the potential harm to the universal service fund of designating a this wireless carrier as an additional ETC in rural areas. Especially, where that carrier already has a significant competitive presence and proposes only an upgrade to its service that will take place regardless of the designation.

C. Unique Advantages and Disadvantages of the Service Offering

The Commission has found that the advantages that MMC will provide include mobility, access to emergency services, and an increased local calling scope. Disadvantages include such things as dead spots and dropped calls.

One distinction between this case and the *Virginia Cellular* and *Highland* cases is that in those cases the companies each presented some specific build-out plans for adding additional towers and being able to service areas where currently no landline service exists and to improve dead spots. MMC presented evidence that it has already helped Mid-Missouri Telephone Company serve one customer where the landline would have been cost-prohibitive.⁷⁸ However, no evidence was presented that any other ILEC has not been able or would not be able to meet its carrier of last resort options. Also, MMC has only generally said that it

⁷³ Ex. 8, p. 17.

⁷⁴ See Universal Service Administration Company Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003, Appendix HC 1 (Universal Service Administrative Company, August 1, 2003) demonstrating that the total amount of high-cost universal service support is \$857,903,276 in the Fourth Quarter of 2003.

⁷⁵ *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High Cost Universal Service Support and the ETC Process*, CC Docket No. 96-45, 18 FCC Rcd 1941, Public Notice (rel. Feb. 7, 2003).

⁷⁶ *Alma and Citizens Initial Brief*, pp. 7-9.

⁷⁷ Ex. 8, p. 25.

⁷⁸ Tr. pp. 97-99.

would increase its network capabilities. It has not presented any specific plans for how to upgrade its network, except for the technology upgrade. Without specific plans for upgrades before it, the Commission cannot determine that MMC will offer any advantages over its current service offering.

D. Commitments to Quality of Service

Another disadvantage of wireless service is that the company is not subject to the mandatory quality of service standards with which the landline companies must comply. MMC has committed to complying with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service and to reporting the number of complaints it receives and the number of customers it cannot serve.

The Intervenor argues, however, that the Commission will have no tool to actually insure compliance since the cellular company does not have its rates and services regulated by the Commission. All of the parties agree that the only power the state Commission has once the designation is made is to revoke the ETC designation. Thus, the Commission's ability to guarantee the quality of service is limited.

Another concern is that the Consumer Code is not nearly as rigorous regarding quality of service as the requirements on the landline companies. The Intervenor suggests that if ETC status is granted, that it should be conditioned on the same quality of service standards that the landline companies must provide. MMC argues that by doing so, the Commission would be posing an unreasonable barrier to entry for the cellular company.

At least one court has ruled that Section 214(e)(2) does not prohibit the states from imposing additional eligibility requirement on ETCs.⁷⁹ However, the states may be limited in their ability to enforce the additional requirements. The Commission concludes that if ETC status were granted to MMC, it would be necessary to place sufficient requirements regarding quality of service to insure that customers would be protected.

E. Ability to Serve

One of the recommendations by the Joint Board is that state commissions may choose to require a formal build-out plan. Since MMC has not proposed any specific written plan for insuring it is capable of providing service, the Intervenor suggests that MMC has not proven it is capable of providing service.

MMC has committed that it is willing to accept carrier-of-last-resort status and there was no evidence that suggested MMC was currently unable to serve the areas where ETC designation is requested. In addition, the MMC witnesses testified that the company would go to whatever lengths were necessary to make certain it could serve any customer, at least within that customer's home. Thus, the Commission concludes that MMC has the ability to serve the area.

⁷⁹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999).

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Non-Rural Areas

As previously stated, in order to be granted ETC status in the non-rural areas, MMC must also show that the designation will be, "consistent with the public interest, convenience and necessity."⁸⁰ MMC put forth no evidence showing any distinction between the benefits and detriments for the non-rural and rural areas. Thus, the Commission finds these detriments and benefits are the same for the non-rural areas as for the rural areas. For the same reasons it found MMC failed to prove that ETC designation in the rural areas is in the public interest, the Commission determines that MMC has failed to show that the designation in the non-rural areas is "consistent with the public interest, convenience and necessity."⁸¹

Conclusion

The Commission determines that the grant of ETC status to MMC is not in the public interest because MMC has not provided competent and substantial evidence to show that the public will benefit from designating MMC an eligible telecommunications carrier for universal service fund purposes.

MMC has not agreed to abide by the same quality of service standards as landline companies and will not be required to do so by law. The Commission will have no jurisdiction over rates or service plans of MMC, and MMC has not agreed to provide plans with lower rates if it is allowed to become an ETC except for the Lifeline service required under the law. MMC has told the Commission that the funds will be used for an upgrade of its system, but it has not presented the Commission with any construction or financial plans or any timelines for these upgrades.

Additionally, MMC has not shown that the customers will see any increased competition or benefits from the grant of ETC status to MMC. MMC has made no showing that it intends to expand its coverage area or fix dead spots. Although cellular service does offer mobility that the landline carriers cannot provide, that service is already available throughout MMC's service area to those customers who have a need for that service. MMC states that it intends to update its TDMA platform to a CDMA with the funds, but it also admits that it will make the upgrade regardless of whether it is granted ETC status.⁸²

MMC has not met its burden to show that a grant of ETC status in the rural areas is in the public interest. Furthermore, MMC has not shown that a grant of ETC status in the non-rural areas would be "consistent with the public interest, convenience, and necessity."⁸³ Therefore, the Commission will deny MMC's request.

⁸⁰ 47 U.S.C. §214(e)(2).

⁸¹ 47 U.S.C. § 214(e)(2).

⁸² Tr. pp. 55 and 64.

⁸³ 47 U.S.C. § 214(e)(2).

IT IS THEREFORE ORDERED:

1. That the application of Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular to be granted status as an eligible telecommunications carrier for federal universal service fund purposes is denied.
2. That Spectra Communications Group, LLC d/b/a CenturyTel, and CenturyTel of Missouri, LLC's Motion to Accept Proposed Findings of Fact and Conclusions of Law One Day Out of Time is granted.
3. That all objections not ruled on are overruled and all motions not granted are denied.
4. That this Amended Report and Order shall become effective on December 10, 2004.

Gaw, Ch., Clayton, Davis, and
Appling, CC., concur;
Murray C., dissents, with separate
dissenting opinion attached;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I would grant ETC status to applicant in the non-rural areas, in accordance with Section 214(e)(2) of the Federal Telecommunications Act. I conclude, with the majority, that Mid-Missouri Cellular has met the requirements set out in Section 214(e)(1)(A) and (B) of the Act. Therefore, I interpret the act to direct this Commission to designate the applicant as an eligible telecommunications carrier for the non-rural service areas.

For that reason, I respectfully dissent.

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**GS Technology Operating Company, Inc., doing business as
GST Steel Company, Complainant, v. Kansas City Power &
Light Company, Respondent.***

*Case No. EC-99-553
Decided December 2, 2004*

Electric §9. GS Technology Operating Company's (GST) complaint was not perfected in accordance with Section 386.390.1, RSMo. In the Commission's Report and Order on Remand, the Commission determined the merits of GST's complaint "upon its own motion" as provided by Section 386.390.1.

Electric §9. The Commission is not authorized to award GS Technology Operating Company (GST) or Kansas City Power & Light Company (KCPL) monetary relief or change the companies' special contract. After a hearing, the Commission may set reasonable and just prospective rates; thus the Commission had the authority to determine if GST has been overcharged by KCPL.

Electric §20. The Commission is not authorized to award GS Technology Operating Company (GST) or Kansas City Power & Light Company (KCPL) monetary relief or change the companies' special contract. After a hearing, the Commission may set reasonable and just prospective rates; thus the Commission had the authority to determine if GST has been overcharged by KCPL.

Electric §20. In the Commission's Report and Order on Remand, the Commission found that GS Technology Operating Company's (GST) charges were appropriately calculated under the special contract negotiated between the parties and approved by the Commission. GST knew of the risks when it agreed to the special contract and failed to prove it was overcharged by Kansas City Power & Light Company.

Electric §24. In the Commission's Report and Order on Remand, the Commission found the performance of Kansas City Power & Light Company's (KCPL) system to be acceptable at the time in question; however, GS Technology Operating Company had noticed a declining trend in KCPL's performance.

Electric §32. In the Report and Order on Remand, the Commission found GS Technology Operating Company (GST) failed to show, by competent and substantial evidence, the explosion resulted from imprudence on the part of Kansas City Power & Light Company.

Evidence, Practice & Procedure §4. In the Commission's Report and Order on Remand, the Commission found that a Complainant who alleges that a regulated utility has acted in an unjust or unreasonable manner has the burden of proof. GS Technology Operating Company failed to meet the burden of proof with clear and convincing evidence that Kansas City Power & Light Company unreasonably responded to the flooding at the plant.

Evidence, Practice & Procedure §6. In the Report and Order on Remand, the Commission found GS Technology Operating Company (GST) failed to show, by competent and substantial evidence, the explosion resulted from imprudence on the part of Kansas City Power & Light Company.

Evidence, Practice & Procedure §15. In the Report and Order on Remand, the Commission found GS Technology Operating Company (GST) failed to show, by competent and substantial evidence, the explosion resulted from imprudence on the part of Kansas City Power & Light Company.

* See pages 89 and 186, Volume 9, MPSC 3d, for other orders in this case.

Evidence, Practice & Procedure §26. In the Commission's Report and Order on Remand, the Commission found that GS Technology Operating Company (GST) failed to show the explosion resulted from imprudence on the part of Kansas City Power & Light Company. A Complainant alleging that a regulated utility has acted in an unjust or unreasonable manner has the burden of proof, which GST failed to meet.

APPEARANCES

Paul S. DeFord and Kurt U. Schaefer, Lathrop & Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri 64108, for Complainant GS Technology Operating Company, Inc., doing business as GST Steel Company.

James W. Brew and Shaun Mohler, Brickfield, Burchette & Ritts, P.C., 1025 Thomas Jefferson Street N.W., Suite 2800, Washington, D.C. 20007, for Complainant GS Technology Operating Company, Inc., doing business as GST Steel Company.

Karl Zobrist, Blackwell Sanders Peper & Martin, L.L.P., Post Office Box 419777, Kansas City, Missouri 64141-6777, for Respondent Kansas City Power & Light Company.

James M. Fischer and Larry W. Dority, Fischer & Dority, P.C., 101 West McCarty Street, Jefferson City, Missouri 65101, for Respondent Kansas City Power & Light Company.

Gerald A. Reynolds, Kansas City Power & Light Company, 1201 Walnut Street, Kansas City, Missouri 64106, for Respondent Kansas City Power & Light Company.

John B. Coffman, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Steven Dottheim, Chief Deputy General Counsel, and *Lera Shemwell*, Assistant General Counsel, Missouri Public Service Commission, Truman State Office Building, 301 West High Street, Room 530, Jefferson City, Missouri 65101, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGES: **Kevin A. Thompson, Deputy Chief,**
 Lewis R. Mills, Jr., Deputy Chief.

REPORT AND ORDER

Preface

The Commission issued its Report and Order in this case on July 13, 2000, and on August 8, 2000, denied an application for rehearing filed by GS Technology Operating Company, Inc., doing business as GST Steel Company (GST). GST sought review of the Commission's decision in the Cole County Circuit Court, which affirmed the Commission's decision. GST then appealed to the Western District Court of Appeals. In *State ex rel. GS Technologies Operating Co., Inc. d/b/a GST Steel Company v. The Public Service Commission*, 116 S.W.3d 680 (Mo.App. 2003), the Court affirmed the circuit court's affirmation of the Commission's decision in most respects, and reversed and remanded on two specific aspects.

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First, the Court found that the Commission had discretion to afford little weight to evidence presented by GST's expert witness Ward, but that the Commission did so on a mischaracterization of KCPL's objection to the expert testimony. The Court therefore found that the Commission erred in concluding that no substantive evidence was introduced to support Ward's opinion testimony. The cause was remanded to the Commission to reconsider the testimony of GST's expert witness, including the attachments to the testimony that were admitted without objection.

Second, the Court found that the Commission failed to make findings on GST's theory that KCPL should have responded to the flooding at the Hawthorn plant by placing a hold on the Hawthorn power plant's gas supply valve. The Court stated that the question of whether KCPL was imprudent for failing to place this hold was a dispositive issue in the case, and directed the Commission to make findings on the evidence concerning this theory.

In this Report and Order on Remand, the Commission remedies the errors found by the Court, specifically considering all the attachments to GST witness Ward's testimony, and making specific findings with respect to the failure to place a hold on the main gas valve. This Report and Order on Remand reaches the same conclusion as in the original Report and Order: that GST has failed to show that the explosion at the Hawthorn station resulted from imprudence on the part of Kansas City Power & Light Company.

Procedural History

On May 11, 1999, GS Technology Operating Company, Inc., doing business as GST Steel Company (GST), filed its Petition for an Investigation as to the Adequacy of Service provided by the Kansas City Power & Light Company (KCPL) and Request for Immediate Relief. GST filed its petition in both Highly Confidential (HC) and Nonproprietary (NP) versions, together with a motion for a protective order. GST sought a protective order to protect the details of its special contract with KCPL from disclosure. On May 12, GST filed a Supplement to its petition, as well as the supporting affidavit of Ronald F. Lewonski. On May 18, KCPL filed its response, in HC and NP versions, to GST's request for immediate relief; GST replied on May 21, 1999.

The Commission construed GST's petition as a complaint and issued its Notice of Complaint on May 26, 1999. The Commission also adopted a protective order on that date. On June 1, the Staff of the Missouri Public Service Commission (Staff) responded to GST's petition and request for immediate relief. However, on the same day, the Commission issued its order denying GST's request for immediate relief, shortening the time allowed KCPL to answer the complaint, setting a prehearing conference, and requiring the filing of a procedural schedule.

On June 9, 1999, KCPL filed its Answer in HC and NP versions. An amended Answer was filed on September 9, 1999, also in HC and NP versions. A prehearing conference was held on June 11. On June 18, the parties filed a joint proposed procedural schedule. Also on that date, GST filed its request for interim relief and expedited hearings in HC and NP versions. The Commission adopted the joint proposed procedural schedule by order issued on June 22. On June 28, KCPL responded in opposition to GST's request for interim relief. Staff responded on the

same day, but supported GST's request. KCPL responded to Staff's response on July 7, and the Commission denied GST's request for interim relief by order issued on July 9, 1999. GST applied for reconsideration and clarification on July 21. KCPL responded on August 3, in HC and NP versions. The Commission denied GST's motion on August 19, 1999.

Meanwhile, the first of several discovery disputes arose on July 2, 1999, when GST filed its motion to compel KCPL to respond to its first set of interrogatories and requests for production. KCPL responded on July 14. On July 23, GST filed its motion to compel responses to its second and third sets of discovery in HC and NP versions. On July 26, the Commission by order shortened the time allowed to KCPL to respond to GST's second motion to compel. On July 28, GST filed, in HC and NP versions, its reply to KCPL's response to its first motion to compel. On July 29, the Commission issued its Order Regarding GST's First Motion to Compel and Amending the Procedural Schedule.

KCPL notified the Commission by letter on August 3 that it had re-evaluated its objections to GST's second and third sets of discovery in the light of the Commission's order of July 29; it filed its HC and NP versions of its response to GST's second motion to compel on the same day. On August 9, KCPL moved for clarification, reconsideration and rehearing of the Commission's order of July 29. On August 11, KCPL filed its modified response to GST's second motion to compel; GST replied on August 17. On August 19, the Commission issued its order regarding GST's second motion to compel and regarding KCPL's motion for clarification of August 9.

On August 31, 1999, KCPL filed its first motion to compel discovery with supporting suggestions, in HC and NP versions. On September 13, GST and KCPL moved jointly to modify the procedural schedule. On September 21, the Commission modified the procedural schedule as requested by the parties and, as GST had never responded, granted KCPL's first motion to compel. On September 22, the Commission issued a Notice of Correction.

On October 4, 1999, James Brew moved for leave to appear for GST *pro hac vice*. On the same day, GST moved for reconsideration with respect to the Commission's granting of KCPL's first motion to compel, and belatedly filed its response to that motion. GST also filed supporting suggestions on that day. As grounds for reconsideration, GST stated that it had never been served with a copy of KCPL's first motion to compel. Therefore, the Commission on October 6, 1999, issued its Order Directing Filing, requiring the parties to specify the date and manner, if any, in which that motion had been served upon them. Public Counsel filed its response on October 8; Staff filed its response on October 14. Neither of these parties had ever been served with KCPL's motion, although both had received a copy from the Commission in the normal course of affairs. Also on October 14, counsel for GST and KCPL filed a joint response, in which KCPL consented to the vacation of the Commission's order granting its first motion to compel and to GST's late response. Accordingly, on October 19, the Commission vacated the portion of its order of September 21 that concerned KCPL's first motion to compel. At the same time, the Commission granted Mr. Brew's motion to appear *pro hac vice* and gave notice of its acceptance of KCPL's Amended Answer, to which no party had objected.

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Meanwhile, on October 13, 1999, KCPL filed its second motion to compel discovery and, on October 19, GST and KCPL again moved jointly for modification of the procedural schedule. On the latter day, KCPL moved to limit the scope of discovery and the issues. On October 19, the Commission again modified the procedural schedule as requested by the parties. The Commission issued a Notice of Correction on October 20.

On October 21, 1999, KCPL replied to GST's belated response to its first motion to compel. On October 28, both GST and the Staff responded to KCPL's motion to limit the scope of discovery and the issues. On November 2, the Commission issued its new order regarding KCPL's first motion to compel; on November 5, the Commission issued its order regarding KCPL's second motion to compel. Therein, the Commission granted KCPL's second motion to compel, again because GST had never responded to it. On November 8, KCPL replied to GST and the Staff as to KCPL's motion to limit the scope of discovery and the issues. On November 16, the Commission issued its order disposing of KCPL's motion to limit the scope of discovery and the issues.

On November 18, GST responded in opposition to KCPL's request for alternative relief, contained in its November 8 reply. Therein, KCPL had requested that the Commission hold this case in abeyance pending the Commission's final resolution of its investigation of the Hawthorn incident in Case No. ES-99-581. On December 1, the Commission denied KCPL's request for alternative relief. On the same day, GST filed its motion seeking clarification and reconsideration of the Commission's order of November 5, granting KCPL's second motion to compel. GST filed a corrected version of this motion on December 2. KCPL responded in opposition to GST's motion on December 13 and GST replied on December 22.

On January 6, 2000, the Commission issued its Order to Show Cause. This order denied GST's motion for clarification and reconsideration as to the Commission's order of November 5, 1999, which had granted KCPL's second motion to compel. The Show Cause Order also vacated a portion of the Commission's Order of November 2, 1999, regarding KCPL's first motion to compel, and directed GST to respond to certain data requests (DRs) to which the Commission had originally sustained GST's objection. The Commission took this action because, through the pleadings filed on December 13 and December 22, the Commission learned for the first time that GST Steel Company (GST Steel) was not a distinct legal entity from GS Technology Operating Company, Inc. As this was the basis on which GST's objection to certain DRs had been sustained, that determination necessarily had to be reversed. The Show Cause Order also set a show cause hearing on January 18, 2000, for GST to show why sanctions ought not be imposed upon it or upon its attorneys. Finally, the Show Cause Order suspended the procedural schedule pending the Commission's decision on the Show Cause Order, except for a prehearing conference set for January 18.

On January 7, 2000, the Commission issued a procedural order with respect to the show cause hearing. On January 13, GST filed its response to the Show Cause Order, as well as a motion for leave to file out of time. KCPL and Staff also responded to the Show Cause Order on that day. On January 18, the Commission held the show cause hearing, as well as the prehearing conference previously

scheduled for that day. KCPL filed a letter brief on January 20; GST filed copies of certain authorities on the same day. KCPL filed a further letter brief on January 27, to which GST responded on February 2.

On February 17, 2000, the Commission issued its Order Concerning the Show Cause Hearing. In that order, the Commission determined that, while GST had engaged in discovery misconduct, GST's attorneys had not. The Commission imposed no sanction because KCPL represented that any prejudice was cured. The Commission also established a new procedural schedule and directed the parties to file memoranda of law regarding the Commission's subject matter jurisdiction with respect to the issues raised by GST's petition and the remedies therein sought. These memoranda were filed on March 17. In the order of February 17, the Commission also reformed the style of the case to reflect the relationship of GST Steel Company and GS Technology Operating Company, Inc., and directed GST to amend its petition to correctly state that relationship. GST complied on February 29.

On February 22, 2000, GST filed its third motion to compel and also requested directed findings and interim relief; GST filed a correction of this motion on February 24. KCPL responded on March 3 and GST replied on March 13. On March 2, the presiding officer notified the parties that all pending discovery matters would be taken up at the prehearing conference scheduled for March 10. At that conference, the presiding officer heard the arguments of the parties regarding GST's third motion to compel. The parties were able to resolve several discovery issues at that time. On March 23, the Commission granted GST's third motion to compel and denied its requests for directed findings and for interim relief.

On April 5, 2000, the Commission by order directed KCPL to file a privilege log referred to in a letter copied to the presiding officer by KCPL on April 4. The Commission filed that letter in the case. KCPL filed the privilege log on April 17. On April 11, KCPL moved to strike portions of the direct testimony of GST's witness Jerry N. Ward. This motion was taken up at the hearing as insufficient time remained to deal with it prior to the hearing.

Pursuant to the procedural schedule and the Commission's rules, the parties filed prepared testimony. GST filed direct testimony on November 17, 1999, as well as evidence on billing by KCPL on November 18 and November 22. KCPL and Staff filed rebuttal testimony on February 28, 2000. The parties filed a list of issues and agreed order of witnesses and cross-examination on March 10. GST filed surrebuttal testimony on April 6 and Staff filed cross-surrebuttal on the same date. The parties filed their position statements on April 12 and certain affidavits and schedules were filed on April 14.

The Commission held an evidentiary hearing on April 17 and 18, 2000. All parties were represented at the evidentiary hearing and were accorded a full and fair opportunity to adduce evidence in support of their positions and to cross-examine adverse witnesses. The hearing transcript was filed on April 25, 2000, and the Commission established a briefing schedule by order on April 27. On May 11, Staff was excused, at its request, from filing proposed findings of fact and conclusions of law.

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Staff and KCPL filed initial briefs on May 12, 2000; KCPL also filed proposed findings of fact and conclusions of law on that date, in HC and NP versions. Also on that date, GST moved for leave to file its initial brief and its proposed findings of fact and conclusions of law out of time. The Public Counsel advised the Commission by letter that it would not brief the case.

On May 15, 2000, GST filed its initial brief and its proposed findings of fact and conclusions of law. On May 24, the parties filed their reply briefs. GST also on that date filed its corrected proposed findings of fact and conclusions of law, HC and NP versions.

GST's Motion for Leave to File Out of Time:

GST moved for leave on May 12, 2000, to file its initial brief and proposed findings of fact and conclusions of law out of time. Thereafter, it filed these items on May 15, with a correction on May 24. No party has objected to GST's motion and the time for doing so has long since passed. Therefore, the Commission will grant GST's motion.

Discussion

Pursuant to the procedural schedule established by the Commission, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its position with respect to each issue. The issues formulated by the parties are as follows:

1. Have the charges imposed under the GST/KCPL Special Contract been "just and reasonable" over the period of the contract?
2. Has KCPL properly accounted for the insurance proceeds that it has received as a result of the Hawthorn incident?
3. Does the Commission have the authority to order KCPL to pay GST insurance proceeds received by KCPL as a result of the explosion of the Hawthorn 5 plant? If so, is it reasonable and appropriate to do so?
4. Does the Commission have the authority to order KCPL to recalculate GST's bills under the contract? If so, should those bills be recalculated (i.e., by using KCPL's incremental costs as if Hawthorn continued to operate)? Is it reasonable and appropriate to do so?
5. Has KCPL operated and maintained its generation units in a reasonable and prudent manner?
6. Has KCPL operated and maintained its distribution and transmission facilities in a reasonable and prudent manner?
7. Should the Commission order a formal investigation into the operation and maintenance of KCPL's generation, transmission and distribution facilities?
8. Should the Commission delay any decision in this case pending the outcome of the Staff's independent and final report of the boiler explosion at Hawthorn 5?

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been

considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The Special Contract:

GS Technology Operating Company, Inc., doing business as GST Steel Company, is a corporation engaged in the manufacture of steel in Kansas City, Missouri. Specifically, GST manufactures grinding balls and rods for the mining industry and carbon wire rods. GST uses electric arc furnaces in its manufacturing process which consume extremely large amounts of electricity. GST purchases this electricity from KCPL and GST is KCPL's largest "single point retail customer," that is, its largest customer taking service at one location. GST has no other source of electricity available to it in Kansas City.

The steel industry is extremely competitive. GST has sought to acquire electric service at an advantageous price through a special contract with KCPL, the "Amended and Restated Power Supply Agreement," executed on August 12, 1994. This special contract was approved by the Commission. *In the Matter of a Special Contract filed by Kansas City Power & Light Company*, Case No. EO-95-67 (*Order Approving Agreement and Tariff*, issued October 26, 1994). The special contract, which is confidential, provides a formula by which to calculate the price which GST pays to KCPL for electric service. At all times herein pertinent, KCPL accurately computed its charges for electric service to GST pursuant to the special contract.

The special contract provides flexibility to GST by permitting it to schedule production when KCPL's incremental costs are low. The special contract price includes a fixed component and a variable component. The variable component fluctuates as KCPL's incremental production costs fluctuate. Factors affecting the variable component of the special contract price are KCPL's fuel costs, operations and maintenance expenses, and purchased power expenses.

Under the special contract, GST has paid significantly less for electric service than it would have paid under KCPL's applicable general service tariffs. Under the special contract, GST is not subject to the rate increases, nor does it benefit from the rate decreases, that are applicable to KCPL's regular Missouri retail customers. The special contract permits GST to opt for service under any of KCPL's general service tariffs at any time. GST has never exercised this option.

KCPL's System:

KCPL owned and operated, in whole or in part, seven fossil fuel generating units, one nuclear generating unit, and several gas/oil peaking units. Among the generating assets operated by KCPL was Hawthorn Generating Station Unit No. 5 (Hawthorn 5), a 479 megawatt (MW) coal-fired, baseload generating unit that entered service in 1956.¹ Hawthorn 5 was one of KCPL's more economical baseload units and generated about 2 million MW hours (MWh) annually. KCPL's other baseload generating stations were Montrose 1, 2 and 3 (total rating of 563 MW), Iatan (726 MW), LaCygne 1 and 2 (total rating of 1,619 MW), and Wolf Creek

¹ A "baseload" unit is one that is always operated at maximum capacity.

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(1,236 MW). While Wolf Creek is a nuclear power plant, the others are all coal-fired, and use either fuel oil or natural gas in addition to coal. Generating resources are generally dispatched in ascending variable cost order; that is, the lower-cost generating units are used before the higher-cost generating units. Hawthorn 5 fell between LaCygne and Montrose in KCPL's resource stack.

In August 1998, a ruptured steam line at Hawthorn 5 caused an unplanned outage at that unit that lasted until November 11, 1998, for a total of 83 days. This outage was caused by a contractor's error, in that the pipe in question was a welded pipe rather than a seamless pipe as specified in the plans. GST experienced increases in the variable portion of its rate under the special contract due to this unplanned outage at Hawthorn 5.

KCPL experienced other outages in its system, both planned and unplanned, in September 1998. GST asserts that not a single KCPL generating unit operated for all 30 days of September 1998. However, total system availability that month was 78 percent. In January 1998, total system availability was 97 percent. Forced outages of short duration are not unusual for baseload, coal-fired generation units.

The Hawthorn Incident:

At about 12:30 a.m. on February 17, 1999, an explosion destroyed Hawthorn 5's 11-story boiler, causing the immediate shutdown of that unit. KCPL has not returned Hawthorn 5 to service since the explosion. The Commission initiated an investigation into the explosion at Hawthorn 5. *In the Matter of Kansas City Power & Light Company*, Case No. ES-99-581. In that case, Staff conducted a lengthy investigation and filed its final investigation report on February 26, 2001. Shortly thereafter, on March 27, 2001, Staff and KCPL filed a Stipulation and Agreement, which was approved by the Commission in an order issued July 12, 2001. In that order, the Commission concluded:

[T]hat the chain of events resulting in the explosion at Hawthorn No. 5 has been identified and that the weaknesses in KCPL's control systems and procedures that permitted the explosion to occur have also been identified. The provisions contained in the Stipulation and Agreement are reasonable and are designed to reduce or prevent the possibility of another, similar explosion.

The Commission did not reach the question of whether KCPL was negligent or imprudent in the chain of events resulting in the explosion.

As a result of the Hawthorn 5 explosion, KCPL estimated that it would experience a net increase in costs for calendar year 1999 between \$6.5 million and \$11.5 million. To replace the power that had been generated by Hawthorn 5, KCPL planned to bring on-line in the spring of 1999 Hawthorn 6, a 142 MW gas-fired combustion turbine generating unit. KCPL also planned to purchase 350,000 MWh on the energy market. KCPL has received \$5 million from an insurance policy covering replacement energy expense in the event of an incident such as the Hawthorn 5 explosion, which it credited to Account 401555, Purchased Power Expense.

KCPL informed GST that the Hawthorn outage would probably result in an increase in KCPL's incremental costs and that these increased costs would be reflected in GST's rate under the special contract. In the nine months following the Hawthorn 5 explosion, GST paid over \$3 million more for electric service to KCPL than it would have paid had Hawthorn 5 remained on-line. Since the Hawthorn 5 explosion, KCPL has relied upon more expensive system resources and higher-priced off-system purchases of replacement power to replace the electricity that would have been generated by Hawthorn 5. The variable portion of GST's rate under the special contract has risen accordingly.

Other Service Disruptions:

GST also experienced repeated service disruptions in 1998 due to recurring KCPL equipment failures at its Blue Valley Substation. KCPL employs seven large 161 kV transformers and nine 13 kV distribution circuits to provide service to GST. Failures of KCPL's Transformer No. 12 cut power to GST's steel mill on January 20, 1998, and repeatedly from July to October of that year. The failure of this transformer was due to manufacturing defects and not to poor maintenance by KCPL. KCPL has replaced that transformer. In November 1998, GST experienced production delays of 545 minutes due to the failure of KCPL's Transformer No. 1A. KCPL's maintenance of this transformer was well within the manufacturer's recommendations.

On November 13, 1998, KCPL's underground Feeder Cable No. 5316-1 failed, causing GST to scrap 15 tons of steel and shut down for 170 minutes. On November 17, 1998, while Feeder No. 5316 was under repair, Feeder No. 5314 was grounded, causing GST to scrap 19 tons of steel. GST's rod mill was shut down for 180 minutes on this occasion and its south plant was shut down for 300 minutes. Cable faults caused eight outages at GST in 1998; however, two of these were cables owned by GST. Many of these equipment failures resulted from upgrades at GST and nearby industrial facilities. Praxair, Inc., a manufacturer of industrial gases and a neighbor of GST, expanded its facilities in 1998, leading to a much larger demand for power. GST itself in the past decade installed computerized production control equipment which is sensitive to voltage fluctuations. KCPL has invested over \$1 million to improve the electric service it provides to GST. Most of the reliability problems raised by GST have already been resolved.

Alleged Management Imprudence:

GST contends that it has experienced increasingly unreliable service from KCPL since July 1998, due to imprudent management decisions by KCPL. GST identifies this imprudence as decreased expenditure on, and attention to, the operation and maintenance of its coal-fired generation units by KCPL's management. In 1994, the percentage of time that Hawthorn 5 was off-line was 7.1 percent; in 1998, it was 33.52 percent. However, although Hawthorn 5 was off-line for an increased period in 1998, its capacity factor for that year was higher than in all previous years except 1997. KCPL's overall maintenance expenditures have decreased from over \$81 million in 1992 to just under \$71 million in 1998. KCPL's operations expenditures associated with its coal-fired plants decreased from approximately \$138.3 million in 1993 to approximately \$126.4 million in 1998.

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KCPL's maintenance expenses associated with its coal-fired plants decreased from about \$39.5 million in 1993 to \$32.6 million in 1998. KCPL reduced its forecasted five-year capital expenditures from \$191.6 million in 1994 to \$81.2 million in 1999.

Analyses of performance data showed that KCPL's system performed within acceptable industry standards throughout the pertinent period. The equivalent availability factor (EAF) for KCPL's units has been close to the peer group average and, thus, at an acceptable level. However, this data did show a declining trend for KCPL's units EAF and increasing forced outage rates at some of its units. The equivalent availability of KCPL's units has been about 80 percent and, between 1994 and 1998, its baseload units have demonstrated relatively high capacity factors:

Unit:	Average Capacity Factor:
Montrose	60.53%
Hawthorn	63.74%
La Cygne	69.69%
Iatan	82.10%
Wolf Creek	97.03%

Purchased Power and Other Expenses:

From 1995 to 1998, KCPL's dependence on purchased power increased as its peak demand rose from 2,714 MW to 3,175 MW, an increase of 17 percent. KCPL's purchased power expense increased from 1994 through 1998 from about \$33.9 million to \$63.6 million. These increases in KCPL's purchased power expense directly affected the variable component of GST's rate under the special contract.

During the same period, KCPL incurred large expenses in connection with mergers. In 1996, KCPL incurred \$13 million in expenses related to an unconsummated merger with UtiliCorp, a \$5 million termination fee arising from the UtiliCorp merger, and another \$13 million to defend against an unsolicited exchange offer by Western Resources. In 1997, KCPL had merger related expenses of about \$7 million and paid \$53 million to UtiliCorp as a termination fee. In 1998, KCPL incurred about \$15 million in expenses related to an attempt to merge with Western Resources. However, GST produced no evidence showing that any of these merger-related expenses were ever passed on to GST.

GST Witness Ward's Investigation:

GST presented the testimony of an expert witness, Jerry N. Ward, in an attempt to show that the explosion was the result of imprudence on the part of KCPL's employees. Mr. Ward does not have an engineering degree, nor is he a licensed professional engineer. He admitted that he had never investigated a power plant explosion before the Hawthorn explosion.

Mr. Ward's testimony is based upon his interpretation of statements of KCPL employees made shortly after the Hawthorn explosion. Mr. Ward did not discuss these statements with any of the KCPL employees. Mr. Ward made no attempt to verify the facts in the statements that he reviewed. Mr. Ward did not discuss the chain of events leading up to the explosion with KCPL personnel familiar with the events, with the insurance carriers' investigators, or with Commission Staff investigating the explosion.

Mr. Ward spent six hours at the Hawthorn site before filing his direct testimony, and another five hours before filing his surrebuttal testimony. These eleven hours constituted the entirety of Mr. Ward's investigation. This time was spent reviewing documents, maps, and records, rather than physically examining the rubble at the Hawthorn explosion site or interviewing witnesses.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

KCPL is an "electrical corporation" and a "public utility" within the intendments of Section 386.020, (15) and (42), RSMo Supp. 1999.² Consequently, the Missouri Public Service Commission has jurisdiction over KCPL's services, activities and rates pursuant to Section 386.250 and Chapter 393, RSMo. However, it does not necessarily follow that the Commission has jurisdiction to hear and determine GST's complaint, or, if the Commission can hear the complaint, that it may grant the relief sought herein by GST.³

Jurisdiction to Hear GST's Complaint:

Citing Section 393.130.1, GST complains that KCPL's cost-based rate for electric service is not just and reasonable because of the inclusion therein of certain imprudently incurred expenses. Likewise, citing the same section, GST complains that the electric service provided by KCPL is inadequate and unreliable, again because of imprudent management. The alleged imprudence is a cost-saving reduction in operational expenses, resulting in inadequate maintenance of KCPL's generation, transmission and distribution assets and systems. The most spectacular example of KCPL's managerial incompetence, GST charges, is the destruction of its Hawthorn 5 generation unit by an explosion. GST seeks several remedies, including a finding that it has been overcharged and recalculation of its bills for services already rendered.

Section 393.130.1, under which GST brings its complaint, provides:

Every gas corporation, every electrical corporation,
every water corporation, and every sewer corporation shall

² All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 1994.

³ GST's initial pleading was styled a "petition," not a "complaint"; however, the two words are synonyms pursuant to Section 386.390.1, RSMo 1994: "Complaint may be made by ... any corporation ... by petition or complaint in writing[.]"

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furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

However, the Commission's power to hear and determine a complaint brought under Section 393.130.1 is defined by Section 386.390.1, which states in pertinent part:

that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

The gravamen of GST's complaint under Section 393.130.1 is that KCPL's charges have not been just and reasonable. Consequently, GST's complaint is subject to the perfection requirement stated in Section 386.390.1. However, GST's complaint is not perfected as that section requires.

At the Commission's direction, the parties addressed this jurisdictional defect in memoranda due on March 17, 2000. In those memoranda, GST and the Staff of the Commission took the position that perfection was not required under a line of cases beginning with *State ex rel. Laundry, Inc. v. Public Service Commission*, 327 Mo. 93, 34 S.W.2d 37 (1931). KCPL, predictably, took the position that perfection under Section 386.390.1 was required and reminded the Commission of various occasions when it had dismissed complaints for lack of perfection.

The Commission agrees with KCPL that GST's complaint must be perfected under Section 386.390.1. *Laundry, Inc.*, *supra*, and its progeny have to do with misclassification, that is, which of several approved rates should a consumer be charged and not, as here, with whether a rate is just and reasonable. However, Section 386.390.1 also provides that the Commission may hear and determine an unperfected complaint "upon its own motion." The statute does not specify when or how the Commission is to exercise this authority. The Commission concludes that it may do so in this order. Therefore, the Commission shall determine the merits of GST's complaint "upon its own motion" as authorized by Section 386.390.1.

Jurisdiction to Provide a Remedy:

As noted previously, however, authority to hear and determine GST's complaint does not necessarily equal authority to grant the relief therein requested. The Public Service Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). While the Commission properly exercises "quasi judicial powers" that are "incidental and necessary to the proper discharge" of its administrative functions, its adjudicative authority is not plenary. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. 1982), quoting *Liechty v. Kansas City Bridge Co.*, 162 S.W.2d 275, 279 (Mo. 1942). "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise." *State Tax Commission, supra*.

The Public Service Commission Act is a remedial statute and thus subject to liberal construction; however, "neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute." *Id.*, quoting *State ex rel. Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (banc 1923). The Commission is without authority to award money to either GST or KCPL, *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943), or to alter, construe or enforce their special contract. *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, (Mo. 1937); *Kansas City Power & Light Co. v. Midland Realty Co.*, 93 S.W.2d 954, 959 (Mo. 1936). The Commission is authorized, after a hearing, to set just and reasonable prospective rates. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 48-49 (Mo. banc 1979). The Commission also has "plenary power to coerce a public utility corporation into a safe and adequate service." *State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 259 Mo. 704, ___, 168 S.W. 1156, 1163 (banc 1914).

The Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, as though some portion of that electricity had been generated by Hawthorn 5 at a lower cost. That would constitute a species of equitable relief and this Commission cannot do equity. See *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940). Likewise, the Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, using insurance proceeds received with respect to the Hawthorn 5 explosion to reduce the cost of replacement power. *American Petroleum Exchange, supra*. With respect to charges already paid for service already rendered, the Commission is authorized to determine that GST has been overcharged; GST may then seek a remedy in the courts. *State ex rel. Kansas City Power & Light Company v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044 (1943); *State ex rel. Inter-City Beverage Co., Inc. v. Missouri Public Service Commission*, 972 S.W.2d 397, 972 (Mo. App., W.D. 1998).

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Sufficiency of the Evidence:

The burden of proof at hearing rests with the complainant in cases where, such as here, the complainant alleges that a regulated utility has engaged in unjust or unreasonable actions. *Ahlstrom v. Empire District Electric Company*, 4 Mo.P.S.C.3d 187, 202 (1995); *Margulis v. Union Electric Company*, 30 Mo.P.S.C. (N.S.) 517, 523 (1991). Thus GST must establish all facts necessary to support the relief it seeks by a preponderance of the credible evidence.

The centerpiece of GST's case is the explosion of KCPL's Hawthorn 5 generating unit. GST presented the testimony of an expert witness, Jerry N. Ward, to show that the explosion was the result of imprudence on the part of KCPL's employees.

"The reception of evidence in hearings of this character should be governed by the rules of evidence as applied in civil cases, excepting insofar as such rules may be modified and relaxed by permissible legislative enactments." *Garrard v. Dep't of Health and Welfare*, 375 S.W.2d 582, 586 (Mo. App. 1964). Section 386.410.1, RSMo Supp. 1999, provides that "in all investigations, inquiries or hearings, the commission or commissioner shall not be bound by the technical rules of evidence."

Nonetheless, Section 386.510 requires that a Commission decision be both reasonable and lawful. A decision "is lawful if the Commission had statutory authority to issue it." *State ex rel. Utility Consumers Council v. Public Service Commission*, 562 S.W.2d 688, 692 (Mo. App., E.D. 1978). A decision "is reasonable if it is supported by competent and substantial evidence on the whole record." *Utility Consumers, supra*; *State ex rel. Ozark Electric Cooperative v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975). "Substantial evidence is evidence that if true has probative force upon the issues[.] Competent evidence is that which is relevant and admissible evidence which is capable of establishing the fact in issue." *Hay v. Schwartz*, 982 S.W.2d 295, 303 (Mo. App., W.D. 1998) (citations and internal quotation marks omitted). Thus, because the Courts have held that a Commission decision must be supported by evidence of record that is both competent and substantial, the technical rules of evidence are indeed very much applicable to Commission proceedings.

Mr. Ward offered expert testimony. Expert testimony takes two forms. An expert may testify as a sort of fact witness to the existence of facts that can only be observed or understood by a person with the requisite expertise. W.A. SCHROEDER, 23 MISSOURI PRACTICE SERIES—EVIDENCE, Sec. 702.1.a(1992). More frequently, an expert offers an opinion "as to the inferences and conclusions that should be drawn from other evidence." *Id.* This sort of testimony is proper where it will "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Section 490.065. Mr. Ward's testimony was of the latter sort.

Experts are generally permitted in Missouri to offer opinion testimony as to causation, including the causes of such incidents as building collapses, fires and blast damage. SCHROEDER, *supra*, Sec. 702.1.b.3.A. Thus, GST offered, and the Commission received, Mr. Ward's expert opinion as to the cause of the boiler explosion at Hawthorn 5.

The Hawthorn 5 Explosion:

At the hearing, GST offered, and the Commission received, the expert opinion of Jerry N. Ward that the Hawthorn 5 explosion was the result of imprudence by KCPL employees. Imprudence, in this regard, is simple negligence, that is, a failure to meet the appropriate minimum standard of care: "Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances[.]" BLACK'S LAW DICTIONARY 1032 (6th ed. (deluxe), 1990). GST, through Mr. Ward, presented two theories on how KCPL's negligence caused the explosion. The Commission will discuss each of these theories.

First, Mr. Ward hypothesized that a failure by KCPL employees to follow proper safety procedures by placing a "hold" on a sewage sump pump while the sewage system was under repair permitted wastewater to back up in the restroom adjacent to the Hawthorn 5 control room, then to flood the control room floor, drip down three stories to the computerized Burner Management System (BMS) and disable the BMS, thereby allowing natural gas to enter the shut-down boiler, which consequently exploded. Mr. Ward was not able to exclude other possible causes of the wastewater backup, which causes were not due to any negligence attributable to KCPL. For example, confronted with a drawing showing the presence of a check valve⁴ between the Hawthorn 5 restroom and the sump pump that he considered to be the likely cause of the wastewater backup, Mr. Ward stated,

The fact that there was a check valve installed is not particularly significant since either it was not working or the piping system that's installed there is installed differently from the description of the drawing. I have no way of knowing.

While not significant to Mr. Ward in terms of his theory of the cause of the explosion, the check valve is necessarily legally significant in assigning blame for the explosion.⁵ For example, if the contractor who built Hawthorn 5 failed to actually install the check valve, the results of that failure would likely be attributable to the negligence of the contractor and not to KCPL. If the check valve was installed, but failed to operate properly, the results of that failure would likely be attributable to the negligence of the manufacturer of the check valve and not to KCPL.

Likewise, Mr. Ward's opinion that KCPL employees caused the backup, and thus the explosion, by failing to place a "hold" on the wastewater sump pump is not persuasive. Mr. Ward admitted that outside maintenance contractors were present at Hawthorn 5 on February 16, 1999, engaged in attempting to clear the clogged sewer line. Mr. Ward was unable to conclusively exclude their activities as a link in the chain of causation leading to the wastewater backup. Cross-examination of Mr. Ward with respect to KCPL's safety procedures suggested that a "hold" on the sump pump was not required where it was not itself under repair and a check valve separated it from the portion of line that was actually under repair.

⁴A check valve is a device in a piping system that prevents liquid contents from flowing in an undesired direction. The purpose of the check valve in question was to prevent wastewater from flowing up into the Hawthorn 5 restroom.

⁵ Assuming that the wastewater backup led to the boiler explosion.

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Second, Mr. Ward provided testimony and evidence in an attempt to support a theory that KCPL acted imprudently in failing to place a hold on the main gas supply valve. Mr. Ward developed this theory from his understanding of KCPL's Safety Manual and its hold procedures. Mr. Ward acknowledged that no work was being done on the main gas supply lines, but concluded that a hold should have been put on the main gas supply valve because of the work being done on the burner management system.

KCPL's safety rules did not require placing a hold on the main gas supply valve while the burner management system was under repair. KCPL's rules do require such a hold when the gas supply lines are being worked on, and Mr. Ward opines that it was imprudent not to apply the reasoning behind that rule to work on the burner management system. Mr. Ward's opinion that the failure to put a hold on the main valve was imprudent relies on hindsight, and not on evidence that the hold was required while the burner management system was being worked on. Given Mr. Ward's lack of experience and training in investigating power plant explosions, and the cursory nature of his investigation, the Commission will give little weight to his opinion.

Based upon the record of this proceeding, and giving consideration to Mr. Ward's testimony and supporting documentation, the Commission finds that Mr. Ward's theory that KCPL acted imprudently in failing to place a hold on the main gas supply valve is not supported by the record. The Commission concludes that GST has failed to meet its burden of proof to show by competent and substantial evidence that KCPL acted imprudently or unreasonably in the manner in which it responded to the flooding at the Hawthorn plant.

For the purposes of this case, the Commission concludes that GST has failed to show that imprudence on the part of KCPL employees caused the explosion at Hawthorn 5 on February 17, 1999. This is not a conclusion that KCPL is not responsible for the Hawthorn 5 explosion. The Commission will not resolve that question in this case.

Adequacy and Reliability of Electric Service:

The Commission concludes that the performance of KCPL's system throughout the pertinent period, with the exception of the Hawthorn 5 explosion, was within acceptable limits. The Commission reiterates that, on this record, it makes no findings as to the Hawthorn explosion. The Commission finds the testimony of Staff expert Dr. Eve Lissik to be both credible and persuasive.

Dr. Lissik analyzed data from KCPL's annual FERC Form 1.⁶ Dr. Lissik concluded that, over the period 1993 to 1998, KCPL's coal-fired production expenses decreased although its overall production expenses increased. Over the same period, Dr. Lissik concluded that coal-fired operation and maintenance expenses declined from two-thirds of KCPL's total production expenses to less than half of the total. Dr. Lissik stated that these patterns may indicate significant changes in management focus at KCPL.

⁶"FERC" is the Federal Energy Regulatory Commission.

Dr. Lissik performed an independent analysis of three factors for each of KCPL's baseload generating units, including net peak demand, capacity factor and percent of time off-line. Dr. Lissik stated that a decrease in the first two of these factors, and an increase in the third, would indicate declining unit availability. Dr. Lissik stated that "Staff found none of these indications." Although Hawthorn 5 was off-line for an increased period in 1998, its capacity factor for that year was higher than in all previous years except 1997. Dr. Lissik offered her opinion that the case presented by GST was "inconclusive."

Dr. Lissik also reviewed the report produced by KCPL's expert Monica Eldridge. Dr. Lissik found Ms. Eldridge's report to be useful and reliable, despite the criticism of GST's expert Don Norwood. Dr. Lissik testified that, based on her review of Ms. Eldridge's report and of other evidence produced by the parties, "KCPL's generating units are operating within acceptable limits." However, Dr. Lissik also stated that the increasing forced outage rates at some of KCPL's units, together with a slight but steady decrease in equivalent availability, was a "cause for some concern." Likewise, in the opinion of Dr. Lissik, KCPL's reductions in operating expenses and capital investment, together with the Hawthorn 5 explosion, "merit further analysis." The Commission also agrees with Dr. Lissik that, while GST has failed to prove its case, it has nonetheless identified a declining trend in KCPL's performance that is a matter for concern.

Just and Reasonable Charges:

The Commission concludes that, throughout the pertinent period, KCPL's charges to GST for electric service have been just and reasonable. The charges were properly and correctly calculated under the special contract, which was freely negotiated by the parties and approved by the Commission. That contract was designed by the parties to afford GST the lowest possible rates for electric service. By virtue of its variable component, which rose and fell as KCPL's incremental costs of production rose and fell, the special contract necessarily carried with it a certain degree of risk. As Staff expert Dr. Michael S. Proctor testified, the parties apportioned these risks when they negotiated their special contract. While GST has not enjoyed rates as low as it evidently hoped for, it has enjoyed rates lower than any of KCPL's tariffed rates. Thus the Commission concludes that GST has not shown that it has been overcharged by KCPL for electric service.

IT IS THEREFORE ORDERED:

1. That the Motion for Leave to File its Brief Out-of-Time, filed by GS Technology Operating Company, doing business as GST Steel Company, on May 12, 2000, is granted.
2. That any pending motions not otherwise granted are denied.
3. That it is the decision of this Commission that the charges of Kansas City Power & Light Company to GS Technology Operating Company, doing business as GST Steel Company, on account of electrical service provided have at all pertinent times been just and reasonable and that GS Technology Operating Company, doing business as GST Steel Company, has not been overcharged therefore.
4. That it is the decision of this Commission that, at all times herein pertinent, Kansas City Power & Light Company has operated and maintained its generating, distributing and transmitting system at an adequate level, except as stated in Ordered Paragraph 5, below.

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5. That the Commission makes no findings, and reaches no conclusions, as to the explosion that occurred at Hawthorn Station Unit No. 5 on February 17, 1999, except that the Commission finds that GS Technology Operating Company, doing business as GST Steel Company, has failed to show that the explosion resulted from imprudence on the part of Kansas City Power & Light Company.

6. That this Report and Order shall become effective on December 12, 2004.

7. That this case may be closed on December 13, 2004.

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

*Case No. TO-99-227
Decided December 2, 2004*

Evidence, Practice and Procedure §6. The original Missouri 271 Interconnection Agreement (M2A) between Southwestern Bell Telephone L.P., d/b/a SBC Missouri and Missouri CLEC's in Missouri's interLATA long distance market was modeled after a Section 271 proceeding in Texas. The Texas Commission updated versions of the Business Rules following two six-month review periods. SBC Missouri did not agree with all the changes made by the Texas Commission. SBC Missouri's December 2002 revisions included the revisions SBC Missouri agreed with from both updated versions of the Business Rules.

In the Commission's order, the Commission determined that the changes the parties agreed upon shall be included in the M2A. The Commission also determined that the disputed issues do not provide any Missouri-related evidence to determine if the issues are in the public interest and will not be included in the M2A.

Telecommunications §7. Pursuant to 47 U.S.C. §252(e)(2)(A)(ii), the Commission has jurisdiction in determining if the model interconnection agreement and any modifications are in the public interest.

Telecommunications §46. The original Missouri 271 Interconnection Agreement (M2A) between Southwestern Bell Telephone L.P., d/b/a SBC Missouri and Missouri CLEC's in Missouri's interLATA long distance market was modeled after a Section 271 proceeding in Texas. The Texas Commission updated versions of the Business Rules following two six-month review periods. SBC Missouri did not agree with all the changes made by the Texas Commission. SBC Missouri's December 2002 revisions included the revisions SBC Missouri agreed with from both updated versions of the Business Rules.

In the Commission's order, the Commission determined that the changes the parties agreed upon shall be included in the M2A. The Commission also determined that the disputed issues do not provide any Missouri-related evidence to determine if the issues are in the public interest and will not be included in the M2A.

**ORDER REGARDING MOTION TO UPDATE ATTACHMENT 17
OF THE MISSOURI 271 INTERCONNECTION AGREEMENT**

Syllabus: This order approves certain amendments to the Missouri 271 Interconnection Agreement (M2A), directs further filings, and sets a procedure for the expedited approval of the amendments.

On March 18, 2002, Southwestern Bell Telephone L.P., d/b/a SBC Missouri, filed its Motion to Update Attachment 17 of the Missouri 271 Interconnection

* See page 181, Volume 9 MPSC 3d and pages 69, 73, 117, 150, 409, 429 and 432, Volume 10, MPSC 3d, for other orders in this case.

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Agreement to replace Version 1.7 of the performance measure Business Rules with Version 2.0 of those rules, and make other related changes to the M2A. On December 2, 2002, SBC Missouri requested that the Commission approve Version 3.0 of the Business Rules with the exception of the modifications to which SBC Missouri was not in agreement. Several competitive local exchange carriers¹ participated in the proceedings and objected to some of the proposed amendments.

BACKGROUND

On March 6, 2001, the Commission issued its *Order Finding Compliance With the Requirements of Section 271 of the Telecommunications Act of 1996* in which the Commission approved the M2A, and found that SBC Missouri's Section 271 Application, along with the M2A as revised on February 28, 2001, satisfied the requirements of Section 271(c) of the Telecommunications Act of 1996.²

The M2A approved by the Commission in March, 2001, is in large part based upon a similar agreement, known as the T2A, approved in 1999 by the Texas Public Utilities Commission following an extensive review of SBC Texas' application to provide long distance service in Texas and a collaborative project between many of the CLECs and other state utility commissions including Missouri.

As the Commission found in its 271 Order,³ the M2A generally follows the substantive terms of the T2A, but also incorporates arbitration decisions of the Commission, as well as other modifications.⁴ The interconnection agreements based on the M2A are binding contracts between a CLEC and SBC Missouri, which contain the terms for interconnection, access to unbundled network elements, resale, and other provisions.⁵ The Commission also recognized in the 271 Order that nothing precludes a CLEC from negotiating a different agreement with SBC Missouri outside the terms and conditions contained in the M2A.⁶

Attachment 17 of the M2A includes a Performance Remedy Plan under which SBC Missouri reports its wholesale performance on a monthly basis under numerous performance measures, and provides comparisons of that performance to SBC Missouri's performance with respect to its own retail business or to a benchmark, whichever is applicable. Appendix 3 to Attachment 17 of the M2A

¹ AT&T Communications of the Southwest, Inc., NuVox Communications of Missouri, Inc., MCI WorldCom Communications, Inc., MCI WorldCom Network Services, Inc., MCIMetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., IP Communications of Missouri, Inc., and XO Missouri, Inc. McLeodUSA Telecommunications Services, Inc., and the Small Telephone Company Group also remain parties to the case.

² Order Finding Compliance With the Requirements of Section 271 of the Telecommunications Act of 1996, p. 5 (March 6, 2001).

³ *Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement*, (issued March 15, 2001).

⁴ 271 Order at p. 10.

⁵ *Id.*

⁶ *Id.* at p. 19.

contains the comprehensive Business Rules applicable to the various performance measures.⁷

The current M2A includes the set of performance measures known as Version 1.7 of the Business Rules as the appropriate set of performance measurements to be utilized by SBC Missouri and the CLECs. In April, 2001, a six-month review of Version 1.7 of the performance measures, as contemplated under the T2A, was conducted by the Texas Commission. Representatives from the Commission's Staff attended this six-month review and participated in the collaborative process. The result of this process was the development of Version 2.0 of the Business Rules. Version 2.0 of the Business Rules was approved by the Texas Commission, and was subsequently adopted by the Arkansas Public Service Commission, the Kansas Corporation Commission, and the Oklahoma Corporation Commission.

SBC Missouri's Requested Amendments

On March 18, 2002, SBC Missouri filed its Motion to Update Attachment 17 of the M2A to include Version 2.0 of the Business Rules with the Commission. In its Motion, SBC Missouri stated that the six-month review process conducted by the Texas Commission had resulted in a few changes with which SBC Missouri did not agree. SBC Missouri identified the specific changes with which it did not agree as follows:

- SBC Missouri opposed being required to implement new measurements that would assess its performance under its interstate and intrastate tariffs for the provisioning of retail Special Access services. SBC Missouri argued that Special Access services are provided only as a consequence of and in accordance with tariffs, and thus, they are not part of the M2A and SBC Missouri cannot legally be subject to them.

- The implementation of PM 1.2, regarding loop makeup information, as defined in the Six-Month Review was unacceptable to SBC Missouri. PM 1.2 was proposed to compare loop makeup information provided to CLECs, including SBC Missouri's affiliate, with loop makeup information contained in SBC Missouri's engineering records. SBC Missouri argued that PM 1.2 does not accomplish its intended purpose, i.e., measuring the accuracy of SBC Missouri's loop makeup information.

- Finally, SBC Missouri objected to the extent that punitive penalties were intended to apply with regard to PM 13. SBC Missouri advised the Commission that it had agreed to an audit of its processes and data calculation in Texas and a restatement of the data relating to PM 13 in all of its states. SBC Missouri advised that it would agree to retroactively make any necessary payments that resulted from the restatement or audit described above, but these payments would be at the level established for this performance measure when it was developed, i.e., the "low" level, not the "high" level. SBC Missouri noted that it had requested clarification from the Texas Commission as to its intent with regard to PM 13.

⁷ The Business Rules associated with the performance measures are themselves part of the measures in that they generally describe the underlying operational process being measured as well as the manner in which data with respect to that process shall be collected. Thus, for purposes of this order, the two may be referred to interchangeably as performance measures, except where indicated otherwise.

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SBC Missouri did not agree to these three areas of performance measures being implemented in Texas, and they were not included in Version 2.0 of the Business Rules submitted to the Commission by SBC Missouri. In support of its proposal, SBC Missouri referred to the language contained in Section 6.4 of Attachment 17 of the M2A, which addresses the circumstances under which changes to existing performance measures of interconnection agreements may occur and new measurements may be added:

Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration.

SBC Missouri also submitted and sought Commission approval of an updated version of Appendix 1 to Attachment 17 of the M2A (Measurements Subject to Per Occurrence Damages or Assessment with a Cap and Measurements Subject to Per Measure Damages or Assessment) and Appendix 2 to Attachment 17 of the M2A (Performance Measures Subject to Tier-1 and Tier-2 Damages Identified as High, Medium and Low). SBC Missouri also submitted a revised version of the General Terms and Conditions and Attachment 17 of the M2A, reflecting proposed revisions to three pages of the M2A. In addition, SBC Missouri proposed changing the date appearing in the upper right corner of each page of these documents to reflect the date of its filing.

SBC Missouri also proposed a process to make the modified M2A available to CLECs electing to adopt the M2A as a basis for their interconnection agreement with SBC Missouri. Under SBC Missouri's proposal, the new version of Attachment 17 would become the basis for payment of Tier 2 penalty assessments to the state of Missouri upon the effective date of the Commission's order approving the modifications. SBC Missouri also proposed to negotiate a standard amendment to existing interconnection agreements based on the M2A to reflect Version 2.0 as submitted to the Commission by SBC Missouri. SBC Missouri agreed that it would prepare and present CLECs with a standard Attachment 17 amendment to an M2A-based interconnection agreement, which would reflect the updates to the M2A as described.

SBC Missouri further proposed a streamlined process where upon CLEC execution of the standard Attachment 17 amendment and the filing of such amendment with the Commission, the amendment would become effective immediately upon filing with the Commission, similar to the process adopted by the Commission regarding approval of interconnection agreements based upon the M2A.

Before the Commission ruled on SBC's motion to update to Version 2.0 with amendments, the Texas Commission conducted another six-month review of Version 2.0 of the Business Rules, at which representatives of SBC Missouri and the Commission again attended. This proceeding was completed in October 2, 2002, and on October 17, 2002, the Texas Commission issued Order No. 45 in Project 20400. In this Order, the Texas Commission directed SBC Texas to file, by November 1, 2002, modifications to the Performance Remedy Plan and Perfor-

mance Measurements to be incorporated into Attachment 17 of the T2A. These revisions to the Business Rules are referred to as Version 3.0. On November 1, 2002, SBC Texas filed a motion for reconsideration of the Texas Commission's Order No. 45 in Project 20400. Also, on November 1, 2002, pursuant to Order No. 45, SBC Texas filed proposed revisions to the T2A to incorporate Version 3.0 of the Business Rules in Attachment 17 as described in Order No. 45.

On November 22, 2002, Staff filed a Report and Recommendation Regarding the Texas Commission's Orders Nos. 45 and 46 Approving Modifications to Performance Remedy Plan and Performance Measurements. In its Report and Recommendation, Staff indicated that it had reviewed the Texas Commission's Orders Nos. 45 and 46, as well as SBC Texas' November 1, 2002 compliance filing, and that Staff was unaware of any reason why the decisions made by the Texas Commission would be inappropriate if applied in Missouri.

The compliance filing submitted by SBC Texas to the Texas Commission on November 1, 2002, included changes to Version 2.0 of the Business Rules, as well as to Attachment 17 of the T2A, the Performance Remedy Plan, with which SBC Texas did not agree. These changes were described in SBC Missouri's Response to Staff's Report and Recommendation, which SBC Missouri filed on December 2, 2002. The specific modifications required by the Texas Commission with which SBC Missouri did not agree at that time were described in SBC Missouri's Response as follows:

- Texas Commission ordered modifications to the application of the "K-Table" in the T2A Performance Remedy Plan;
- The Texas Commission's ruling on disaggregating performance measurements relating to the provisions of enhanced extended loops (EELs);
- The Texas Commission's determination that the "tails test" portion of the firm order commitment calculation for electronically submitted and process LSR should remain a remedied part of PM 5;
- The Texas Commission's ruling to not eliminate LEX/EDI disaggregations for Performance Measurement 13 at the Tier 2 level;
- The Texas Commission's ruling ordering the reduction of the benchmark on PM 115.2 from 5% to 2%; and
- The Texas Commission's rule requiring SBC Missouri to provide disaggregation for line splitting for certain performance measurements (PMs 55.1, 56, 58, 59, 60, 62, 65, 65.1, 67 and 69).

On March 5, 2003, the Texas Commission issued Order No. 47 denying SBC Texas' motion for reconsideration for Order No. 45.

SBC Missouri proposed that the Commission approve an updated version of Attachment 17 and its appendices to include only the changes to the performance measures with which SBC Missouri agreed. SBC Missouri also attached revised versions of the M2A General Terms and Conditions and Attachment 17. These documents reflected revisions to three pages of the M2A necessary to replace Version 1.7 with Version 3.0: page iii of the Table of Contents to the General Terms and Conditions; page 38 of the General Terms and Conditions; and page 22 of Attachment 17.

The revisions submitted by SBC Missouri on December 2, 2002, included all changes with which SBC Missouri agreed from both Version 2.0 and Version 3.0

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of the Business Rules. In addition, SBC Missouri proposed a process under which these modifications would become available on a going-forward basis to CLECs electing to adopt the M2A as their interconnection agreement in the state of Missouri, as well as making the revisions available to those CLECs with existing Commission-approved interconnection agreements based upon the M2A, through an expedited approval process.

On May 16, 2003, in response to the Commission's *Order Directing Filing and Setting Oral Arguments*, SBC Missouri submitted its Status Report, updated changes to the Attachment 17 measurements and associated business rules and a Proposed Order. In this pleading, SBC Missouri again argued that Section 6.4 of Attachment 17 of the M2A arguing that Section 6.4 controls the limited circumstances under which changes and additions to the Performance Remedy Plan and Business Rules may be made. SBC Missouri stated that although it reserves its right under Section 6.4 of Attachment 17 of the M2A to object to the inclusion of any changes or additions to Attachment 17 with which it does not agree, SBC Missouri is now willing to accept nearly all of the modifications to the Business Rules adopted by Texas Commission in the last two six-month performance measures review proceedings, as currently implemented in the Texas T2A. SBC Missouri stated that it did not agree to the "K-Table" changes ordered by the Texas Commission in its Order No. 45, and did not agree to two changes resulting from the Texas Commission's six-month review relating to Version 1.7, but not implemented in the T2A.

CLEC Arguments

AT&T opposed SBC Missouri's request to adopt less than all of the amendments from the six-month review held in Texas. AT&T also argued that this Commission can issue an order requiring inclusion of all the results of six-month reviews into the M2A. AT&T argued that such a ruling was necessary to prevent the review process from breaking down.

IP and NuVox also filed a response to SBC Missouri's motion to update the M2A. Like AT&T, they argued that all the results of the Texas six-month review should be included in the M2A. If changes are stayed during an appeal in Texas, there should be a stay here as well. If a change is reversed on appeal in Texas, the result should be the same here as well. These parties also advised the Commission that IP and SWBT had resolved the dispute over sampling methodology under PM 1.2. They recommended that the M2A be amended to reflect the results of the six-month review, to enable CLECs to adopt the new Attachment 17.

On December 12, 2002, AT&T responded to the recommendation of Staff and SBC Missouri to adopt Version 3.0 of the Business Rules with some modifications proposed by SBC Missouri. AT&T advised that it had filed pleadings in opposition to SBC Missouri's request for reconsideration in Texas regarding Order No. 45. AT&T also noted that it had identified what it considered to be a significant defect in SBC Missouri's purported compliance filing in Texas. AT&T argued that SBC had made some unilateral changes to "series 13" disposition codes in Appendix 2 of the Business Rules. AT&T alleged these changes violated directives of the Texas Commission. AT&T indicated it supported Staff's original recommendation to adopt the changes resulting from Orders Nos. 45 and 46 in Texas.

Also on December 12, 2002, the MCI companies replied to SBC. These companies supported Staff's proposal to incorporate the changes from Texas Orders Nos. 45 and 46 into the M2A and otherwise argued in support of making changes to the M2A with respect to the performance plan. The MCI companies argued that SBC Missouri had committed to make the same performance measures approved in Texas available in Missouri when seeking 271 relief. They argued that the Commission has continuing jurisdiction under Section 271(d)(6)(A) to determine whether the M2A, and the recommendations made to the FCC in reliance thereon, remains appropriate, including the performance measures. They argued that the Commission has jurisdiction to consider changes to existing agreements in conjunction with monitoring the status of the model agreement. They also argued that the proceedings in Texas fulfilled any requirement for an arbitration of these issues if such an arbitration is required.

Other State Proceedings

As directed by the Commission, the parties addressed the status of related proceedings in other states.

On March 5, 2003, the Texas Commission issued Order No. 47 in Project 20400, in which it denied SBC Texas' and IP's motions for reconsideration of Order No. 45. On March 28, 2003, SBC Texas filed a Complaint, including a request for injunctive relief, in which it appealed the Texas Commission's Order No. 45 in United States District Court for the Western District of Texas. In its Complaint, SBC Texas sought to overturn the changes in the Performance Remedy Plan ordered by the Texas Commission in Order No. 45 relating to changes to the "K-Table" contained in the Performance Remedy Plan in the T2A. The "K-Table" issue is the only issue of the several issues contained in SBC's Motion for Reconsideration of the Texas Commission's Order No. 45 that SBC Texas has challenged in Federal Court.⁸ The remaining changes to Attachment 17 of the T2A ordered by the Texas Commission in Order No. 45, which SBC Texas did not originally agree, have either been implemented or are in the process of being implemented in Texas.

The Oklahoma Corporation Commission has approved Version 2.0 of the Business Rules as Appendix 3 to Attachment 17 of the Oklahoma 271 interconnection agreement, as well as related Appendices 1 and 2 to Attachment 17.⁹ The Oklahoma Commission found that Version 2.0 would be available on an ongoing basis to CLECs electing to adopt the O2A as their interconnection agreement with SBC Oklahoma. In addition, the Oklahoma Commission found that Version 2.0 would become the basis for payment of Tier 2 penalty assessments to the state of Oklahoma after the date of that Commission's final order.

With respect to the changes contained in Version 2.0 that SBC Oklahoma did not agree to, the Oklahoma Commission found that those changes would be implemented in Oklahoma in the same manner as ordered by the Texas Commission. SBC Oklahoma has not requested that Version 3.0 of the Business Rules into the O2A be adopted in Oklahoma.

⁸ *Southwestern Bell Telephone, L.P., d/b/a SBC Texas, v. Public Utilities Commission of Texas, et al.*, Civil Action No. SA-03-CA-249-FB.

⁹ *Final Order Approving Version 2.0 of Performance Measures*, Cause No. PUD 200200192, Order No. 465113 (issued July 1, 2002).

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The Kansas Corporation Commission has also approved Version 2.0.¹⁰ The Kansas Commission also required SBC Kansas to file any additional modifications to the plan as they are implemented by the Texas Commission.¹¹ The Kansas Commission stated that the “modification shall be effective when filed, subject to stay and subject to modification based on the result of an appeal in Texas or reconsideration by the Texas Commission.”¹² The Kansas Commission later issued its Order On Reconsideration and adopted a process through which modifications could be contested prior to implementation. Pursuant to this revised process:

modifications are still to be filed by SWBT within ten days of the date they are implemented in Texas; however, the modifications will be effective 15 days after the date they are filed unless the Commission issues an order staying the effective date. A party must file a motion to stay the effective date within three days of the date the modifications are filed.¹³

On December 12, 2002, the Kansas Commission issued an order addressing SBC Kansas’ Motion for Clarification and stated that modifications should be filed in Kansas ten days after the “effective date” of the modifications in Texas.¹⁴

In Kansas, it was agreed that the Texas Commission’s Order No. 47 would be the “triggering event” for SBC Kansas’ filings with the Kansas Commission unless otherwise directed by the Kansas Commission. As a result, SBC Kansas filed Version 3.0 of the performance measurement Business Rules with the Kansas Commission but asked the Kansas Commission to stay the effectiveness of the K-Table changes ordered by the Texas Commission in Order No. 45. The Kansas Commission granted SBC Kansas’ Motion for Stay, pending additional review of the status of Version 3.0 in Texas. The Kansas Commission later approved the use of Version 3.0, and concluded that “the modification to the K-Table is not ‘effective’ in Texas and will not be approved at this time.”¹⁵ SBC Kansas was directed to report to the Kansas Commission within ten days from any changes in the status of SBC Texas’ appeal or its agreement with the Texas Attorney General.¹⁶

The Arkansas Public Service Commission issued an order in which it directed SBC Arkansas to file Version 2.0 of the Business Rules, together with any future revisions made effective by the Texas Commission, with the Arkansas Commission.¹⁷ The Arkansas Commission also found that revisions to the Business Rules

¹⁰ Kansas Corporation Commission Docket No. 01-SWBT-999-MIS, (order issued August 22, 2001).

¹¹ Order issued May 9, 2002.

¹² May 9, 2002, Order, p. 12, para. B.

¹³ June 27, 2002, Order, p. 5, para. 12.

¹⁴ December 12, 2002, Order, pp. 2-3, para. 4.

¹⁵ May 27, 2003, order, p. 5, para. 15.

¹⁶ *Id.*, p. 5, para. 16.

¹⁷ Arkansas Public Service Commission Docket No. 00211-U, order issued September 18, 2001.

filed with the Arkansas Commission would have the same effective date as the corresponding revisions made to the T2A. The Arkansas Commission directed SBC Arkansas to provide notice of any changes to the performance measures contained in the A2A.

On November 8, 2001, the Arkansas Commission issued an order clarifying that although SBC Arkansas was required to file changes to performance measurements as they are approved by the Texas Commission, this would not preclude SBC Arkansas from requesting the Arkansas Commission to stay the implementation of any performance measurement with which SBC Arkansas does not agree. The Arkansas Commission found that SBC Arkansas can separately challenge changes in performance measurements in Arkansas, whether SBC has agreed or not agreed to the changes in Texas. The Arkansas Commission also found that SBC Arkansas could seek a stay from the Arkansas Commission of the effective date of any changes in the performance measurements or Business Rules. SBC Arkansas later filed Version 3.0 of the performance measurements Business Rules. SBC Arkansas did not implement the “K-Table” revisions to the Performance Remedy Plan ordered by the Texas Commission in the A2A, since the Arkansas Commission’s notice filing procedures described above only apply to the Business Rules, not the Performance Remedy Plan.

The Remaining Contested Issues

The parties agree that at least the modifications in Version 3.0 that are not objected to should be incorporated into the M2A. The Commission finds that it should direct SBC Missouri to incorporate those agreed-to changes into the M2A. Several issues, however, remain contested by SBC Missouri and the CLECs. With regard to the disputed provisions the record before the Commission is virtually barren of facts upon which to support any additional modifications. The contested issues are described below.

DECISION

The Commission has jurisdiction to determine if an interconnection agreement is the public interest.¹⁸ SBC Missouri did not offer the M2A without the Commission first reviewing it and determining that its provisions, if offered, would be in the public interest. At the time the original M2A was approved it was a model agreement and it was fully expected by the Commission that it would subsequently be amended to be consistent with the six-month reviews and what was taking place in SBC’s five-state area.

The Commission has general supervisory powers to guide competition and determine if interconnection agreements are in the public interest. As a model agreement, the Commission also has the authority to determine if the M2A should be amended and if those amendments would be in the public interest.

The basic arguments of the parties are that neither SBC Missouri nor the CLECs want to include in the M2A provisions to which they do not agree. For SBC those provisions are the amendments to the K-Table, special access performance measures, and Performance Measure 13. For the CLECs the contested provi-

¹⁸ 47 U.S.C. § 252(e)(2)(A)(ii).

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sions are the revisions to the disposition codes of Appendix 2 of the Business Rules.

None of the parties have put forth any Missouri-specific data or evidence to show the Commission how the various changes will impact Missouri operations. All the Commission may rely on are its former determinations, the recommendation of its Staff, the proceedings in other SBC states, and the arguments of the parties. Thus, based on this record, even though the Commission has the authority to amend its model agreement, the Commission determines that it should only implement those changes as amendments to the M2A to which the parties agree.

Revisions to the K-Table

The "K-Table" issue relates to the financial payments SBC Missouri would be required to make based upon its performance. Under the current M2A agreements the Performance Remedy Plan requires SBC Missouri to automatically make payments either to an affected CLEC or to the state of Missouri when its performance falls short of the agreed-upon standards. SBC Missouri agreed to such a framework in Attachment 17 to the M2A as a condition to the Commission recommending approval of its 271 Application at the Federal Communications Commission.

SBC Texas and the Texas Attorney General's Office, representing the Texas Commission, have reached an agreement on the injunctive relief requested by SBC Texas. Under that agreement, the K-Table changes required by the Texas Commission in its Order No. 45 have not been made to Attachment 17 of the T2A, and SBC Texas is accruing in a separately identified internal account the additional monies which would be owed to CLECs as a result of the Texas Commission's ordered K-Table changes, if they are affirmed by the federal district court.

The Commission determines that the K-Table should not be updated pending the final Federal Court appeal. The Commission is aware that a Judgment was entered on September 30, 2004, dismissing the appeal. SBC Missouri will be directed to notify the Commission of the appeal's finality and the impact on this case. If appropriate, the Commission may reexamine the issue based on Missouri-specific data.

Special Access Performance Measurements

As to special access performance measurements, SBC Missouri objects to those measures and the Texas Commission has determined that those should not be implemented. Likewise, without specific information as to how these measurements will affect the Missouri operations, this Commission will not require their implementation.

Performance Measure 13

Performance Measure 13 was included by the Texas Commission but has not been completely implemented pending an audit in Texas. SBC Missouri objects to its inclusion in Missouri. This Commission concludes that this measure should not be implemented pending the outcome of the final audit in Texas. SBC Missouri will be directed to notify the Commission when the audit in Texas becomes final and to present information to the Commission on how the results of the audit would

have impacted Missouri CLECs. If appropriate, the Commission may at that time reexamine the issue based on Missouri specific data.

Disposition Codes

The final area to which the parties disagree is in the disposition codes of Appendix 2 of the Business Rules. In this instance, the CLECs argue that SBC Missouri is making unilateral changes to which they do not agree. In the last status report to the Commission on April 16, 2004, AT&T had an objection pending at the Texas Commission regarding this issue. As with the other contested changes, the Commission determines that these disposition codes should not be changed over the objection of the CLECs. No evidence was provided which would convince the Commission that these changes should be made over the objection of the CLECs. Furthermore, they appear to not have been finally adopted by the Texas Commission. As with the other changes, the Commission will require SBC Missouri to notify it when the Texas Commission reaches a final decision on the issue and, if appropriate, the Commission may reexamine the issue with the presentation of Missouri-specific evidence.

SBC Missouri will be required to file a new version of the M2A and make those amendments available to the CLECs. The Commission will also set an expedited procedure for the approval of amendments adopted in accordance with this order.

CONCLUSION

The Commission concludes that with the exception of the disposition codes in Appendix 2 the modifications to Attachment 17 of the M2A described by SBC Missouri in its May 16, 2003, Status Report and Proposed Order, and contained in Exhibit A thereto, including updated versions of Appendix 1,¹⁹ Appendix 2,²⁰ and Appendix 3,²¹ which are identical in all substantive respects to the Performance Remedy Plan and Performance Measurements that have been implemented in Texas, Arkansas and Kansas, should be incorporated into Attachment 17 of the M2A. In addition, SBC Missouri's proposed revisions to page iii of the Table of Contents to the General Terms and Conditions, page 40 of the General Terms and Conditions, and page 22 of Attachment 17 should also be incorporated into the M2A.

The updates to Attachment 17 of the M2A that the Commission approves in this order do not include the "K-Table" revisions ordered by the Texas Commission in Order No. 45. The Commission concludes that these changes, which SBC is appealing in Texas, should not be incorporated into the M2A while the appeal is pending in Federal Court. Furthermore, if the appeal should become final, during the term of the M2A, the Commission will need Missouri-specific information regarding the impact of such a change on SBC Missouri and CLECs operating in Missouri before making a final decision on whether to include those changes.

¹⁹ Performance Measurements subject to Tier 1 and Tier 2 damages identified as High, Medium, and Low.

²⁰ Measurements Subject to Per Occurrence Damages or Assessment with a Cap And Measurements Subject to Per Measured Damages or Assessment.

²¹ Performance Measurement Business Rules, Version 3.0.

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Likewise, the Commission concludes that it does not have sufficient evidence to determine whether the changes to the disposition codes of Appendix 2 of the Business Rules should be incorporated over the objections of the CLECs. Thus, the Commission will direct that those changes not be made.

The Commission also concludes that, upon the effective date of this order, the modifications to the M2A approved herein will become effective. In addition, the updated version of Attachment 17 will be the basis for payment of Tier 2 penalty assessments to the state of Missouri for events occurring on or after the effective date of the Commission's order. Those CLECs with existing Commission-approved interconnection agreements based upon the M2A may adopt an amendment to their interconnection agreements to reflect the updates to the M2A approved herein. SBC Missouri should present such CLECs with a standard Attachment 17 amendment to an M2A based interconnection agreement, which amendment will reflect the updates to the M2A described herein.

Consistent with the procedures for adopting the M2A contained in Section 2.1 of the General Terms and Conditions of the M2A, upon execution of the standard Attachment 17 amendment and the filing of such amendment with the Commission, the signed Attachment 17 amendment to an M2A-based interconnection agreement between any CLEC and SBC Missouri shall be deemed approved by the Commission and become effective immediately upon submission to the Commission. No new case need be opened unless there is an objection filed within ten days to the amendment.

The Commission approved the M2A as a model agreement, which at that time the Commission deemed to be in the public interest. Once the M2A was offered to the competitive companies, the Commission used the offer as part of its basis for recommending approval of SBC Missouri's Section 271 Application at the FCC. Now, the parties request updates to the model agreement and the Commission determines based on the arguments and information before it that a revised version of the M2A would be in the public interest if adopted as an interconnection agreement between SBC Missouri and any of the CLECs. Therefore, the Commission concludes that it may determine what changes should be made to the M2A.

The M2A is a model agreement that the Commission deems to be in the public interest and if adopted need not be reviewed further under Section 252. The Commission does not, however, have sufficient information before it to determine that the contested changes would be in the public interest and therefore they will not be ordered.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Motion to Update Attachment 17 of the M2A is granted in part.
2. That no later than December 17, 2004, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, shall file an updated version of Attachment 17 of the M2A as described herein.
3. That based upon Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's commitment to do so, the amended Missouri Interconnection Agreement shall be available to all CLECs with existing interconnection agreements based upon the M2A and all CLECs adopting the M2A as the basis for their interconnection agreement with SBC Missouri as of December 17, 2004.

4. That any objection based on the compliance of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's amendment with this order shall be filed no later than ten days after the date of SBC Missouri's filing.

5. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, shall notify the Commission of a final decision by the Texas Public Utilities Commission with regard to the issue of disposition codes no later than ten days after the issuance of a final decision.

6. That no later than December 17, 2004, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, shall notify the Commission of the status of the Federal Court decision and its impact on this case.

7. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, shall notify the Commission of a final audit in the state of Texas with regard to Performance Measure 13 within ten days of the audit's completion.

8. That upon execution of the standard Attachment 17 amendment to any existing M2A-based interconnection between any CLEC and SBC Missouri and the filing of such amendment with the Commission, the amendment shall be deemed approved by the Commission and become effective immediately upon submission to the Commission.

9. That any objections to amendments as described in Paragraph 8 shall be filed within ten days of the amendment's submission.

10. That all other relief requested not expressly granted in this order is denied.

11. That this order shall become effective on December 12, 2004.

Gaw, Ch., Murray, Clayton,
Davis, and Appling, CC., concur.

Dippell, Senior Regulatory Law Judge

In the Matter of the Application of Missouri Gas Utility, Inc., for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Natural Gas Service in Parts of Harrison, Daviess and Caldwell Counties, To Acquire the Gallatin and Hamilton, Missouri, Natural Gas Systems, and to Encumber the Acquired Assets.

*Case No. GO-2005-0120
Decided December 14, 2004*

Gas §6. Missouri Gas Utility, Inc. (MGU), filed an application requesting that the Missouri Public Service Commission approve its application for a certificate of convenience and necessity; approve MGU's acquisition of the Gallatin and Hamilton, Missouri, natural gas system assets; grant MGU the authority to encumber those assets in connection with the acquisition; and authorize MGU to file tariffs to establish rates, rules, and regulations. The Commission approved a stipulation and agreement that authorized the transfer and resolved all issues between the parties.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: In this order, the Commission approves the stipulation and agreement filed on December 8, 2004.

Background and Procedural History:

On October 29, 2004, Missouri Gas Utility, Inc. (MGU), filed its application with the Missouri Public Service Commission pursuant to Section 393.170, RSMo 2000, 4 CSR 240-2.060, 4 CSR 240-3.205, and 4 CSR 240-3.210. MGU requests that the Commission approve its application for a certificate of convenience and necessity; approve the acquisition of the Gallatin and Hamilton, Missouri, natural gas system assets; grant it the authority to encumber those assets in connection with the acquisition, and authorize MGU to file tariffs to establish rate, rules, and regulations.

In its application, MGU notes that it seeks to acquire the natural gas systems currently operated by the cities of Gallatin and Hamilton, Missouri. These cities formerly operated the systems under lease-purchase agreements. However, the cities have defaulted on those agreements and as a result, there are currently no gas supply contracts in place for the winter season. MGU states that it is attempting to purchase the systems from the trustees and to complete the transactions in sufficient time to prevent the disruption of gas service to the Gallatin and Hamilton customers.¹

¹ The assets were offered for sale on November 30, 2004; MGU was the only bidder.

MGU is a Colorado corporation. MGU's principal office will be located at 702 East Corine, Gallatin, Missouri 64640. MGU is a subsidiary of CNG Holdings, Inc. CNG Holdings' principal office is located in Littleton, Colorado. CNG Holdings also owns Colorado Natural Gas, Inc., which provides natural gas service to approximately 6,300 customers in Colorado.

The City of Gallatin Natural Gas Distribution System serves the City of Gallatin and the surrounding communities of Coffey, Jameson, and Brooklyn, Missouri. The system currently has approximately 460 customers. Construction of the Gallatin system was financed through the use of a lease-purchase agreement. Under the agreement, Gallatin leased and operated the system. MGU indicates that Gallatin has defaulted on the lease agreement.

The City of Hamilton Natural Gas Distribution System serves the City of Hamilton and surrounding areas. The system currently serves 277 customers. Construction of the Hamilton system was also financed through the use of a lease-purchase agreement under which Hamilton leased and operated the system. MGU notes that Hamilton has defaulted on the lease agreement.

On November 4, 2004, the Commission issued an order providing notice and directing interested parties to file applications to intervene. No parties filed applications to intervene. However, on November 19, 2004, the Commission issued an order making the cities of Gallatin and Hamilton parties and scheduling an On-the-Record Presentation. The Commission conducted the On-the-Record Presentation in this matter on November 23, 2004. On December 3, 2004, the Commission issued an order scheduling an evidentiary hearing on December 9, 2004.

On December 8, 2004, the Commission's Staff filed a Nonunanimous Stipulation and Agreement. A copy of the Stipulation and Agreement is attached to this order as Attachment 1.² The Agreement purports to resolve all issues and is signed by Staff, MGU, and the Office of the Public Counsel. The Stipulation and Agreement suggests that, subject to the conditions in the Stipulation, the Commission issue an order authorizing MGU to acquire the natural gas franchise, works, or systems of Gallatin and Hamilton, Missouri; granting MGU a certificate of convenience and necessity for the provision of natural gas service to the public in the service area described in the Agreement; and approving the proposed encumbrance and authorizing MGU to complete the transaction.

The Agreement contains conditions related to service quality, depreciation, gas safety, gas supply, the service territory, the tariff, uniform systems of accounts, corporate allocation issues, acquisition costs, plant in service, affiliate transactions, surveillance, PGA/ACA review, risk of project success, financial issues, insulation of MGU, the first general rate case, and other issues. Along with the Agreement, the parties provided, as Appendix C to the Agreement, illustrative tariff sheets. The parties agree that the Commission should order MGU to file tariff sheets in the form and substance of those illustrative sheets.

² Due to the number of pages, the proposed tariff sheets are not included in Attachment 1.

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Although the cities of Gallatin and Hamilton did not sign the Agreement, they promptly filed a pleading entitled Non-objection to Stipulation and Agreement. The cities indicate that they do not oppose the Agreement, do not request a hearing, and that they encourage the Commission to approve the Stipulation and Agreement.

Also on December 8, 2004, the Commission issued an order postponing the December 9th hearing. That order rescheduled the hearing as an On-the-Record Presentation on December 16th on the Stipulation and Agreement.

On December 10, 2004, Staff filed its suggestions in support of the Stipulation and Agreement.

Decision:

The Commission has considered MGU's Application and supplement, Staff and Public Counsel's responses, the Stipulation and Agreement, the Non-objection to Stipulation and Agreement, along with the rest of the file. Based upon its review, the Commission concludes that the Stipulation and Agreement filed on December 8, 2004, is in the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement (Attachment 1) filed on December 8, 2004, is approved, and the parties are ordered to comply with its terms.
2. That no later than January 2, 2005, Missouri Gas Utility, Inc., shall file proposed tariff sheets that are in the form and substance to the illustrative tariff sheets found in Appendix C to the Nonunanimous Stipulation and Agreement.
3. That the evidentiary hearing scheduled for December 16, 2004, is canceled.
4. That this order shall become effective on December 18, 2004.

Gaw, Ch., Murray, Clayton, Davis, and Appling, CC., concur.

Ruth, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Joint Application of Trigen-Kansas City Energy Corp. and Thermal North America, Inc., for the Authority Necessary for the Transfer of Control, and Sale of All Stock Currently Owned by Trigen Energy Corporation, Inc., to Thermal North America, Inc.

*Case No. HM-2004-0618
Decided December 21, 2004*

Steam §4. The Commission approved a stipulation and agreement regarding the sale of all the stock of a steam heating company to a new holding company.

Steam §9. A company distributing chilled brine for the purpose of operating chillers to provide air conditioning meets the statutory definition of a heating company and is, therefore, subject to regulation by the Commission.

Steam §§9, 12. Public Utilities §2. A company distributing chilled brine for the purpose of operating chillers to provide air conditioning is not a public utility subject to regulation by the Commission where it does not offer its services to the public, but instead sell its service to selected customers under individual, long-term contracts.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT
AND DISCLAIMING JURISDICTION OVER THE CHILLED WATER
OPERATIONS OF TRIGEN-MISSOURI ENERGY CORPORATION**

On June 29, 2004, Trigen-Kansas City Energy Corp. and Thermal North America, Inc., filed a joint application seeking Commission approval of a transaction whereby Thermal North America would acquire the stock of Trigen-Kansas City. Trigen-Kansas City is a Delaware corporation and a subsidiary of Trigen Energy Corporation. Trigen-Kansas City holds a certificate of convenience and necessity from this Commission to provide steam heating service to the public in downtown Kansas City. Thermal North America is a Delaware holding company and after the transaction will continue to operate Trigen-Kansas City's steam system.

On July 1, the Commission provided notice of the filing of the application to the public and to Trigen-Kansas City's customers. The Commission also established July 21 as the date by which any person wishing to intervene in this case should file an application to intervene. No applications to intervene were filed.

The Commission conducted a prehearing conference on August 16. Following that conference, the Commission, on August 30, established a procedural schedule that would lead to a hearing beginning on November 22, and continuing through November 24.

The parties prefiled direct, rebuttal, and surrebuttal testimony. On November 12, the parties filed a list of issues that identified several issues to be addressed by the Commission. The applicants and the Staff of the Commission filed Prehearing Briefs on November 16.

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On November 19, the applicants, Staff, and the Office of the Public Counsel filed a motion asking the Commission to cancel the hearing because the parties had reached an agreement that would eliminate the need for a hearing. The Commission canceled the hearing in an order issued on November 19.

The applicants, Staff, and Public Counsel filed a unanimous stipulation and agreement on November 19 that purports to resolve all contested issues regarding the sale of Trigen-Kansas City's stock to Thermal North America. A copy of the stipulation and agreement is attached to this order. The stipulation and agreement does not resolve one issue raised by Staff that concerns the sale of Trigen-Kansas City's sister corporation, Trigen-Missouri Energy Corporation, to Thermal North America. But the stipulation and agreement provided that the Commission could make a decision on that issue based on the prefiled testimony, without convening a hearing. As required by the stipulation and agreement, Staff filed suggestions in support of the stipulation and agreement on December 1.

Contingent upon the Commission's acceptance of the stipulation and agreement, the parties waive their rights to call, examine, and cross-examine witnesses; to present oral argument or briefs; to have the transcript read by the Commission; to rehearing; and to judicial review. Section 536.060, RSMo 2000, gives the Commission the authority to accept a stipulation and agreement offered by the parties as a resolution of the issues raised in this case.

The stipulation and agreement contains several substantive provisions to which the parties have agreed. Those provisions are as follows:

- 1) Trigen-Kansas City is required to comply with certain filing and reporting requirements;
- 2) The Commission is asked to waive the requirement found in its regulation that Trigen-Kansas City maintain its accounts based on the 1915 Uniform System of Accounts. Instead, Trigen-Kansas City will maintain its accounts based on the Federal Energy Regulatory Commission Uniform System of Accounts for electric companies;
- 3) The parties agree that it is appropriate to use net original cost for valuing rate base. The parties further agree that no acquisition adjustment from this transaction is to be considered in any future Trigen-Kansas City ratemaking proceeding;
- 4) The parties agree that an asset impairment write-down recorded by Trigen-Kansas City and Trigen-Missouri in 2000 should not have been taken. The parties ask the Commission to order that the asset impairment be reversed for accounting and ratemaking purposes;
- 5) The parties agree that for future ratemaking purposes, the original cost of the property purchased by Trigen-Kansas City from Kansas City Power & Light Company as of the March 1990 closing should be set at \$21,722,306 for gross plant in service and \$21,113,902 for the accumulated depreciation reserve. The parties also state their agreement regarding the depreciation rates and balances maintained by Trigen-Kansas City; and
- 6) The parties agree that Trigen-Kansas City, its corporate parents, and Thermal North America will gather and maintain the books and records of the company in the manner specified in the stipulation and agreement. Furthermore,

they agree that the companies will make those records available to Staff and Public Counsel for review.

After reviewing the unanimous stipulation and agreement filed on November 19, the Commission finds that it should be approved. An examination of the testimony prefiled by the parties, as well as the recommendations of the Commission's Staff, indicate that the proposed transaction offers several benefits. Thermal North America, the purchaser, will be financially stable and has expressed a willingness to invest the additional resources needed to improve the steam heating system operated by Trigen-Kansas City. The Commission concludes that the proposed transaction, subject to the terms of the stipulation and agreement, will not be detrimental to the public, and should be approved.

As previously indicated, the stipulation and agreement does not resolve one issue raised by Staff. That issue concerns the chilled water operations of Trigen-Missouri. Trigen-Missouri is a subsidiary of Trigen Energy Corporation, and as such it is a sister corporation to Trigen-Kansas City. Trigen-Missouri's stock is also being sold to Thermal North America, but Trigen-Missouri did not join in the application seeking approval of the sale, and is not a party to this case.

Trigen-Missouri operates two chilled water systems in downtown Kansas City. Trigen-Missouri uses steam purchased from Trigen-Kansas City's steam operation to drive chillers that remove heat from a brine solution that is then piped to customers. The customers use the chilled brine to operate heat exchangers that in turn operate air conditioning systems in the customers' buildings. The no-longer chilled brine is piped back to Trigen-Missouri's chillers, recharged, and again circulated through the system. If the customers were not able to utilize the chilled brine provided by Trigen-Missouri, they would need to use electric power to operate chillers on their own property to run their air conditioning systems.

Trigen-Missouri's operations are not currently regulated by the Commission, and Trigen-Missouri does not believe that it should be subject to regulation in the future. Staff, however, looks at the applicable definitions in the controlling statutes and concludes that Trigen-Missouri is subject to regulation.

The statute to which Staff points is Section 386.020(20), RSMo 2000, which defines "heating company" to include entities that own, operate, manage, or control:

any plant or property for manufacturing and distributing and selling, for distribution, or distributing *hot or cold water*, steam or *currents of hot or cold air* for motive power, heating, cooking, or for any public use or service, in any city, town or village in this state... (emphasis added)

Section 386.020(42), RSMo 2000, then includes "heating company" in the definition of "public utility." Public utilities are subject to regulation by the Commission.

Staff concludes that since Trigen-Missouri is distributing cold water, it fits the definition of heating company and is subject to regulation by the Commission. Staff recognizes that Trigen-Missouri has not applied to the Commission for permission to sell its assets and is not a party to this case. However, Staff is concerned that if Trigen-Missouri is in fact subject to regulation by this Commission and does not obtain the Commission's approval before selling its assets, the sale of the assets could be void under Section 393.190.1, RSMo 2000.

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The applicants contend that Trigen-Missouri is not subject to Commission regulation for several reasons. First, they argue that Trigen-Missouri does not distribute chilled water to its customers so as to fall within the statute's definition because it is circulating a chilled brine solution, not potable water, and because its customers do not consume the chilled brine solution, rather it is merely circulated in a closed system of pipes.

After reading the statutory definition, the Commission must conclude that Trigen-Missouri is distributing cold water to its customers within the meaning of the statute. Any distinction between chilled water and chilled brine is not meaningful within the terms of the statute. That does not mean, however, that Trigen-Missouri's chilled water system is subject to regulation by this Commission.

Trigen-Missouri provides chilled water service to only six large customers, including several governmental entities. Those customers are served under multi-year, long-term individual contracts. Trigen-Missouri does not make its services available to the general public and does not offer a set price by which a customer could choose to receive service. Trigen-Missouri will not take on new customers unless it can economically provide service to that customer, and has declined to offer service to potentially interested parties because the economic of the situation did not work for Trigen-Missouri.¹ The applicants contend that these facts indicate that Trigen-Missouri is not offering its services to the public.

Missouri's courts have consistently held that a company that supplies power or other services to customers on the basis of individual contracts without offering its services to the public at large is not acting as a public utility and is not subject to regulation by this Commission.² That is a factual determination that will depend on the evidence presented in each particular case.³

The evidence presented in this case indicates that Trigen-Missouri, as it is currently operated, is not offering its chilled water service to the public at large. Furthermore, the Commission has never regulated chilled water service. If this issue is presented to the Commission again in a different case, with different facts, the Commission may reach a different conclusion. However, based on the record before it, the Commission is not convinced that it is in the public interest to assert jurisdiction over the chilled water operations of Trigen-Missouri.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on November 19, 2004, is approved, and the signatory parties are ordered to comply with its terms.

¹ Zien Surrebuttal, Page 4, Lines 10-16.

² For example see *State ex rel M.O. Danciger & Co. v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36 (Mo. 1918); *State ex rel Lohman & Farmers Mutual Telephone Company v. Public Service Commission*, 323 Mo. 818, 19 S.W. 2d 1048 (Mo. 1929); *Love 1979 Partners v. Public Service Commission*, 715 S.W.2d 482 (Mo. 1986); and *Osage Water Company v. Miller County Water Authority, Inc.*, 950 S.W.2d 569 (Mo. App. S.D. 1997).

³ For example see *State ex rel Cirese v. Public Service Commission*, 178 S.W. 2d 788 (Mo. App. K.C. 1944).

2. That Thermal North America, Inc., is authorized to directly or indirectly acquire up to and including 100 percent of the equity interests of Trigen-Kansas City Energy Corp., according to the terms of the Purchase and Sale Agreement – Appendix D to the Joint Application.

3. That Thermal North America, Inc., and Trigen-Kansas City Energy Corp. are authorized to enter into, execute and perform in accordance with, or as may be permitted by or result from the terms of the Purchase and Sale Agreement – Appendix D to the Joint Application – as they relate to the transfer of the ownership of Trigen-Kansas City Energy Corp. to Thermal North America, Inc, directly or indirectly.

4. That Thermal North America, Inc., is authorized to enter into, execute and perform in accordance with, or as may be permitted by or result from, the terms of all other documents and to take any and all other actions which may be reasonably necessary and incidental to the performance of the transaction, as it relates to transfer of ownership of Trigen-Kansas City Energy Corp. to Thermal North America, Inc., directly or indirectly.

5. That the requirements of 4 CSR 240-80.020 are waived for Trigen-Kansas City Energy Corp., and it is directed to comply instead with the Federal Energy Regulatory Commission Uniform System of Accounts for electric companies.

6. That the asset impairment taken by Trigen-Kansas City Energy Corp. in 2000 should not have been recorded by Trigen-Kansas City Energy Corp., and shall be reversed for accounting and ratemaking purposes.

7. That the Joint Motion for Leave to Supplement the Record filed on December 3, 2004, is granted.

8. That all prefiled testimony and evidence offered by the parties, including the supplemental materials filed on December 3, 2004, are admitted into evidence.

9. That this order shall become effective on December 31, 2004.

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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In the Matter of the Tariffs Filed by Sprint Missouri, Inc. d/b/a Sprint to Reduce the Basic Rates by the Change in the CPI-TS as Required by Section 392.245(4), Updating Its Maximum Allowable Prices for Non-basic Services and Adjusting Certain Rates as Allowed by Section 392.245(11), and Reducing Certain Switched Access Rates and Rebalancing to Local Rates, as Allowed by Section 392.245(9)*

*Case No. TR-2002-251
Decided December 23, 2004*

Evidence, Practice and Procedure §23. The Commission found sufficient support in the existing record to reject, without a hearing, Public Counsel's motion to suspend a telephone company's tariff filing designed to rebalance its basic local and access service rates.

Rates §110. Based on the cost studies submitted by a telephone company, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.

Telecommunications §14. Based on the cost studies submitted by a telephone company, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.

ORDER ON REMAND

I. PREFACE

The Commission issued an order on December 6, 2001, that approved tariff sheets filed by Sprint Missouri, Inc. d/b/a Sprint. Those tariffs implemented a rebalancing pursuant to Section 392.245, RSMo 2000. The Office of the Public Counsel filed an application for rehearing, which the Commission denied in an order issued December 18, 2001.

Public Counsel sought review in circuit court, where the Commission's decision was affirmed. Public Counsel appealed to the Court of Appeals, Western District, which reversed and remanded to the Commission to make findings of fact sufficient to allow meaningful judicial review.¹ The Court of Appeals determined:

that, when proceeding under Section 392.245.9 RSMo in a "file and suspend" case, the matter is a noncontested case in which there is no automatic right to a hearing. Instead, the decision of whether to suspend a filed tariff that proposes to

* The Commission, in an order issued on February 1, 2005, denied a rehearing in this case. This case was appealed to Cole County Circuit Court (05ACCC00179).

¹ *State ex rel. Coffman v. PSC*, 121 S.W.3d 534 (Mo. Ct. App., 2003).

rebalance a telecommunication company's rates under the statute and to hold a hearing may be determined by the Commission after a review of all of the relevant factors. We review that decision, and, if we conclude that the Commission acted properly in declining to hold a contested hearing, we move to the second stage of the analysis, which considers challenges to the merits of the Commission's order.²

The Court of Appeals, considering the circumstances before the Commission, concluded that the Commission did not abuse its discretion in not holding a hearing and denied Public Counsel's point of error in that regard.

However, this case is before the Commission on remand because of the Court's determination that the findings of fact were insufficient to allow meaningful judicial review. In order to satisfy the remand, the Commission need not hold a hearing, or otherwise adduce additional evidence, but the Commission must annunciate the facts on which it relied when it first approved Sprint's proposed tariff on December 6, 2001. This order sets out those facts, and the related conclusions of law, and affirms the Commission's December 6, 2001 decision. It also resolves certain procedural matters that have arisen since the matter was remanded.

II. PROCEDURAL BACKGROUND

On August 16, 2001, Sprint met with members of the Missouri Public Service Commission Staff to outline Sprint's intention to seek the second of four rate rebalances allowed under Section 392.245.11. (Appendix C, Staff's Verified Recommendation).

On September 7, 2001, Sprint sent Staff a detailed, narrative description of Sprint's rebalancing plan and summary pages of cost studies that would be used to support Sprint's anticipated request for the second of four rate rebalances allowed under Section 392.245.11, RSMo. (Appendix C, Staff's Verified Recommendation). Sprint also sent to Staff the calculations necessary to determine a Weighted Local Service Rate, Weighted Average Composite Access Rate, a summary and detailed analysis of the rate rebalancing, rate and revenue impact for both local and access service, and information on Sprint's Local Intra Office Usage. (Appendix C, Staff's Verified Recommendation). The information on the average rates reflected that the statewide rate for basic local residential service was \$9.84 and the statewide rate for basic local business services was \$17.20. (Appendix C, Staff's Verified Recommendation). The statewide two-way access rate was \$0.195. (Appendix C, Staff's Verified Recommendation). The summaries of the cost for local and business service reflected that the cost for local residential and business services were substantially above the statewide average rates and cost for access substantially below the current rate. (Appendix C, Staff's Verified Recommendation).

On September 13, 2001, Sprint met with the Staff and provided an explanation of the cost models used to develop Sprint's cost to provide basic local service and access service in Missouri. (Staff's Verified Recommendation at Paragraph 5 and

² *Id.*, at 539-540. Citation omitted.

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6 and Appendix B). These cost studies included summaries of the methodology used in Sprint's cost studies and its compliance with long run incremental costing methodology. (Appendix B, Staff's Verified Recommendation). The cost studies contain approximately 260 pages of information regarding the method and inputs used. (Appendix to Staff's Verified Recommendation and Verified Cost Studies filed on December 6, 2001, and Sprint's verified cost studies).

During the week of October 18, 2001, Sprint contacted the Office of the Public Counsel regarding a potential meeting to discuss Sprint's plans for rate rebalancing. (Exhibit 1 to Sprint's Response to the office of Public Counsel's Motion to Suspend Sprint's Annual Price Cap Regulation Tariff Change Requests and Public Counsel's Reply to Sprint and Staffs Filing at Paragraph 6).

On October 26, 2001, Sprint filed with the Commission revised pages for the following Sprint tariffs: (a) General Exchange; (b) Message Telecommunications Service; (c) Private Line Service; (d) WATS; and (e) Access Service. The revisions submitted by Sprint on October 26, 2001, had a proposed effective date of December 11, 2001. Sprint stated that the tariff revisions sought to modify rates in accordance with Sprint's Price Cap regulation, pursuant to Section 392.245, RSMo. Within the filing, Sprint proposed to reduce its basic rates by the change in the CPI-TS as required by Section 392.245(4); update its maximum allowable prices for non-basic services and adjusting certain rates as allowed by Section 392.245(11); and reduce certain switched access rates and rebalanced to local rates, as fully allowed by Section 392.245(9). (Appendix B to Staff's Verified Recommendation).

On December 3, 2001, Public Counsel filed a motion to intervene and suspend Sprint's tariff change. In its motion, Public Counsel admitted that "it could have been more vigilant or aggressive in bringing legal and factual concerns to the Commission at an earlier date," (Motion to Suspend tariff and for Hearing on Rebalancing and Investigation into Cost Justification for Such Rebalancing at Paragraph 6). Public Counsel also argued: (1) The Commission can not consider the tariff until an investigation and a hearing is conducted; (2) The Commission can not approve the tariff until a written report of the investigation is issued and (3) The Commission is required to consider all relevant factors and make specific determinations concerning long run incremental cost.

On December 4, 2001, Sprint responded to Public Counsel's motion, summarizing the results of Sprint's cost studies and explaining how the results satisfied the requirements of Section 392.245.9. Further, Sprint summarized the extent of communication between Sprint and Staff during which the support for the rate rebalance had been fully explained and investigated.

On December 4, 2001, the Commission issued an order requiring that Sprint file its cost studies verified by an affidavit of a knowledgeable person stating that the cost studies are true according to his or her best knowledge. The order also directed Staff to file its analysis, recommendation and any associated work papers that demonstrate compliance with Section 392.245.9 and to verify the accuracy on the documents filed.

On December 5, 2001, Sprint complied with the Commission order and filed cost studies verified by Mr. Kent Dickerson, the Director of Cost Support for Sprint, who performed the study and attested to its accuracy. Also on December 5, 2001, the Staff filed its recommendation, analysis and work papers supporting its analysis and recommendation. These documents and pleadings were verified by Natelle Dietrich, a Regulatory Economist whose duties include analysis of cost telecommunications cost studies, and by Thomas A. Solt, a Regulatory Auditor whose duties include analysis of telecommunications companies' rate filings.

III. FINDINGS OF FACT

At the time of the relevant filings, the average statewide price for Sprint's basic local residential service was \$9.84 and the average statewide rate for basic local business service was \$17.20. (Appendix C, Staff's Verified Recommendation). The statewide two-way access rate was \$0.195. (Appendix C, Staff's Verified Recommendation).

Sprint submitted a verified cost study that was analyzed by members of the Staff of including a Regulatory Economist with responsibility for reviewing telecommunications cost studies.

Sprint's verified cost studies were performed pursuant to a Total Service Long Run Incremental Cost method (TSLRIC). (Appendix B, Staff's Verified Recommendation and Verified Cost Studies). TSLRIC captures forward-looking, long run incremental cost created by total demand for a given service. (Appendix B, Staff's Verified Recommendation and Verified Cost Studies). Sprint's TSLRIC methods utilized least cost, most economical efficient technology and forward-looking engineering practices. (Appendix B, Staff's Verified Recommendation and Verified Cost Studies).

1. *Cost of Providing Basic Local Telecommunications Service*

Sprint's TSLRIC cost study for local service contains four major components: Loop, Network Interface Device (NID), Port, and Usage Cost. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study). The TSLRIC loop costs capture the costs of the customer line from the Central Office to the NID. (page 3 of 8, Cost of Local Service, Loop Cost Study methods, Sprint's Verified Cost Study). Sprint assigned 75% of the loop cost to intrastate jurisdiction. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study). The NID cost represents the cost for the interconnection to the customer premise wiring. (page 3 of 6, Cost of Local Service, NID Methodology, Sprint's Verified Cost Study). The port costs reflect the non-sensitive traffic cost for local switching associated with basic local exchange service. (page 3 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). In developing the switching TSLRIC cost for local service, Sprint utilized the Switch Cost Information System/Model Office (SCIS/MO), developed by Telecordia that is widely used to capture switch investment in the telecommunications industry. (page 4 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). The usage cost category represents the investment associated with usage sensitive line-side switching. (page 12 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). Finally, Sprint developed a Common cost factor that was applied to the cost components before identifying a TSLRIC cost. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study).

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Further, while Public Counsel has raised an issue of whether the studies correctly allocate the loop cost, the Commission finds that the TSLRIC cost produced by Sprint's studies would allow removal of over 50% of the loop cost assigned by Sprint to basic residential local service that appear on Row 20 of the Summary Sheet contained in Sprint's Cost of Local Service. This would still allow three more rate rebalancings of \$1.50 each to be placed on basic local service and still maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local residential service. (page 1 of 8, Summary Sheet, Cost of Local Service, Residential Cost Summary, Sprint's Verified Cost Studies).

Additionally, the Commission finds that the TSLRIC cost produced by Sprint's studies would allow removal of over 33% of the loop cost assigned by Sprint to basic business intrastate jurisdictional local service that appear on Row 20 of Sprint Summary Sheet for business cost, which would still allow three more rate rebalancings of \$1.50 each to be placed on basic local service and maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local business service. (page 3 of 8, Summary Sheet, Cost of Local Service, Business Cost Summary, Sprint's Verified Cost Studies).

The Commission finds that the costs that are produced by Sprint's cost study (classified as Highly Confidential pursuant to a protective order issued in this case) clearly demonstrate that Sprint's cost of basic local service is more than sufficiently above the price of basic local service to allow for three more rate rebalances of \$1.50 each to be placed on basic local service and maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local service.

2. Cost of Providing Intrastate Switched Access Service

With respect to Sprint's intrastate switched access long run incremental cost, Sprint also performed and verified a TSLRIC cost study. Sprint's cost studies capture forward-looking least cost digital switch technology. (page 6 of 16, Host Cost Switching Inputs, Sprint's Verified Cost Studies). There are three components of the switching study: tandem switching, call termination, and common transport. (page 1 of 1, Cost Summary, Cost of Access, Sprint Verified Cost Study). There is also a common factor applied to each component of the switching cost. (page 1 of 1, Cost Summary, Cost of Access, Sprint Verified Cost Study).

The costs that are produced by Sprint's intrastate access cost study (also classified as Highly Confidential) clearly demonstrate that Sprint's cost of intrastate access is more than sufficiently below the price of intrastate access service to allow for three more rate rebalancings of \$1.50 each to be placed on basic local service and still maintain a price for access that is equal to or more than the long run incremental cost of Sprint's intrastate service.

The revenue analysis that was submitted by Sprint and appears in Staff's Verified Analysis and Recommendation demonstrates that the proposed balance is revenue neutral because Sprint proposes to reduce its access charges in such a way as to decrease its annual revenue by \$2,968,000 and Sprint proposes to make up this revenue loss by raising its basic local service rates by \$1.50 per month per access line, with an estimated revenue impact of \$2,967,000 annually. (Staff's Verified Recommendation and Analysis).

Further, while Public Counsel has raised an issue of whether the studies correctly allocate the loop cost, we find that the TSLRIC cost produced by Sprint's studies would allow us to allocate almost 100% of the intrastate loop cost to intrastate access that appear on Row 20 of the Summary Sheet contained in Sprint's Cost of Local Service and still allow three more rate rebalancings of \$1.50 each to be placed on basic local service, with a resulting decrease in the access price, and maintain a price for access that is equal to or above the long run incremental cost of Sprint's access service. To arrive at this conclusion based on the record in front of the Commission, the total minutes of access (Attachment: Rates #4, page 1 of 3 in Appendix C of Staff's verified filing) were divided by the number of lines (pages 1 and 2 of summary sheet, Cost of Local Service in Sprint's and Staffs verified filings) to get the total number of minutes per line. Then 100% of the cost of the loop was divided by the total number of minutes per line.

The Commission finds that Sprint's cost studies clearly show that the proposed rebalancing is in conformance with the law, even if substantial costs were allocated away from the local loop.

IV. CONCLUSIONS OF LAW

Sprint is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245, RSMO.

Section 386.020(4) defines basic local telecommunications service as follows:

- (4) "Basic local telecommunications service," two-way switched voice service within a local calling scope as determined by the commission comprised of any of the following services and their recurring and nonrecurring charges:
 - (a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;
 - (b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;
 - (c) Access to local emergency services including, but not limited to, 911 service established by local authorities;
 - (d) Access to basic local operator services;
 - (e) Access to basic local directory assistance;
 - (f) Standard intercept service;
 - (g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;

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(h) One standard white pages directory listing.

Section 386.020(17) defines exchange access service as follows:

(17) "Exchange access service," a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications services.

Section 392.245 governs the Commission's determination in this case, and states in pertinent part:

No later than one year after the date the incumbent local exchange telecommunications company becomes subject to regulation under this section, the commission shall complete investigation of the cost justification for the reduction of intrastate access rates and the increase of maximum allowable prices for basic local telecommunication service. If the commission determines that the company's monthly maximum allowable average statewide prices for basic local telecommunications service after adjustment pursuant to this subsection will be equal to or less than the long run incremental cost, as defined in section 386.020 RSMo, of providing basic local telecommunications service and that the company's intrastate access rates after adjustment pursuant to this subsection will exceed the long run incremental cost, as defined in section 386.020 RSMo, of providing intrastate access services, the commission shall allow the company to offset the revenue loss resulting from the remaining three-quarters of the total needed to bring that company's intrastate access rates to one hundred fifty percent of the interstate level by increasing the company's monthly maximum allowable prices applicable to basic local telecommunications service by an amount not to exceed one dollar fifty cents on each of the next three anniversary dates thereafter; otherwise, the commission shall order the reduction of intrastate access rates and the increase of monthly maximum allowable prices for basic local telecommunications services to be terminated at the levels the commission determines to be cost-justified.

Section 386.020(32) defines long run incremental cost as:

(32) "Long run incremental cost," the change in total costs of the company of producing an increment of output in the long run when the company uses least cost technology, and excluding any costs that, in the long run, are not brought into existence as a direct result of the increment of output. The relevant increment of output shall be the level of output necessary to satisfy total current demand levels for the service in question, or, for the new services, demand levels that can be demonstrably anticipated.

Section 386.020(32) specifically excludes from the Commission's consideration any cost not brought into existence as a direct result of the increment of output subject to the cost studies. Therefore, in considering the long run incremental cost of basic local service that requires switched voice services within a local calling scope, we find that it does not violate the statutory definition of long run incremental cost to include a substantial portion, and perhaps the entire portion, of the jurisdictionalized loop cost as cost of basic local service. Further, in considering the long run incremental cost of access service that allows a telecommunications company to enter and exit the local exchange telecommunications network, we find that it does not violate the statutory definition of long run incremental cost to exclude a substantial portion, and perhaps the entire portion, of the jurisdictionalized loop cost as cost of access service. If Sprint did not offer access service, the cost of the loop would not go away. Finally, given the large margins of error with respect to allocating loop costs discussed above, we find that the Commission does not have to make a definitive finding in this case on what exact percentage of the loop, if any, needs to be allocated away from basic local telecommunications service to intrastate switched access services. Based on the above, we find that Sprint's cost studies are consistent with the statutory directive to identify cost based on long run incremental cost as defined in Section 386.020(32).

Finally, the issue of loop allocation as it relates to the Public Counsel 254(k)³ argument has been dealt with by the FCC. In its CALLs Order⁴, the FCC reduced, and in most instances, eliminated implicit subsidies for the local loop among end-users by permitting loop costs to be recovered through a flat rate charge assessed on the basic local service customer rather than through the traffic sensitive per minute charge assessed on the long distance customer. Further, opponents of this cost recovery structure argued that the CALLs proposal violated Section 254(k) for similar reasons as Public Counsel has cited here and the FCC rejected those arguments. The FCC stated:

We find that section 254(k) is not implicated by our action today. Section 254(k) is directed at the allocation of costs between competitive and non-competitive services, both regulated and non-regulated, and prohibits subsidization of competitive services by non-competitive services. The SLC is a method of recovering loop costs; not an allocation of those costs between supported and unsupported services.

Neither basic local service nor switched access service were competitive services for Sprint at the time of the Commission order. Further, the cost studies were consistent with the statutory requirement.

The mathematical questions before the Commission are apparent:

(a) Are Sprint's costs to provide basic local residence service higher than \$11.24 for this year (and higher than \$14.24 for future years)?

³ 47 U.S.C. Section 254(k).

⁴ Sixth Report And Order In Cc Docket Nos. 96-262 And 94-1; Report And Order In Cc Docket No. 99-249; Eleventh Report And Order In Cc Docket No. 96-45; issued May 31, 2000; at Paragraph 91.

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(b) Are Sprint's costs to provide basic local business service higher than \$18.54 for this year (and higher than \$21.54 for future years)? and

(c) Are Sprint's costs to provide access services lower than \$0.185 for this year (and lower than \$0.165 for future years)?

Based on the record in front of the Commission, the answer to each one of these questions is yes.

Therefore, from a mathematical perspective, Sprint clearly meets the statutory requirements in that its cost to provide basic local service is higher than the price and the opposite is true for switched access services. That leaves only one question remaining before the Commission: have Sprint's cost studies that provided the input for the mathematical equation produced accurate and reasonable results? Once again, the answer is yes.

First, as an independent and knowledgeable party, Staff spent a substantial amount of time and effort in the evaluation of Sprint's cost models. This information formed a part of Staff's recommendation to approve Sprint's requested tariff changes. Second, Sprint's costs for basic local service are so far above Sprint's rates that even if an error was made, that error would have to produce results nearly 50% below what was produced by Sprint's cost study to make a difference in the Commission's calculation. With reference to Sprint's access study, the error would have to be even greater than 50% to have any effect on the Commission's mathematical determination.

Thus, the margin of error is substantial. Furthermore, there are no indications of any errors, much less substantial errors in Sprint's cost studies. Sprint's cost studies are correct and fully comply with the statutory requirement to reflect long run incremental cost.

V. PENDING PROCEDURAL MATTERS

On February 2, 2004, the Circuit Court of Cole County, Missouri issued an order remanding this case to the Commission pursuant to the decision of the Court of Appeals. On February 6, 2004, the Commission issued an order offering the parties the opportunity to provide suggestions as to how the Commission should proceed on remand. Both Sprint and Staff proposed that the Commission detail the facts in the record that supported its December 6, 2001 order, as the record existed at that time. Sprint provided proposed findings of fact and conclusions of law (which the Commission has largely adopted herein).

Public Counsel, on the other hand, insisted that additional evidence should be considered on remand. Public Counsel, in a filing made April 9, 2004, reiterated the arguments it made in the fall of 2001 and offered written testimony to support those arguments. These arguments were fully considered by the Commission when they were first raised, and found to be insufficient to require a hearing. The Court of Appeals affirmed the Commission's discretion to proceed without a hearing. Nothing Public Counsel has raised on remand has changed the landscape sufficiently to now require a hearing.

Public Counsel's arguments are essentially: A) the Commission should conduct a hearing; and B) Sprint's cost study is fatally flawed because it allocated all of the costs of the basic loop to the Basic Local Service category. As noted above,

the Court of Appeals has rejected the first argument. Also as noted above, even if large portions of the costs are allocated away from the basic loop, Sprint still meets the statutory test. While the Commission is not concluding that all cost studies for all purposes should allocate the entire cost of the loop to basic service, the fact that Sprint's cost study did so does not require the Commission to reject it. The numbers produced by the study are robust enough for the Commission to conclude, and the Commission does conclude, that under any reasonable allocation of loop costs, Sprint's proposed rebalancing meets the statutory test.

Sprint objected, on June 7, 2004, to Public Counsel's final proffer of written testimony, and moved to strike that evidence. Sprint argues that Public Counsel violated the terms of a protective order in another Commission case. Sprint also argues that Public Counsel inappropriately withheld arguments and evidence from its initial filing until its reply filing so that Sprint would be prevented from responding. Because the Commission is basing this order on remand on the record that existed on December 6, 2001, and not relying on evidence submitted after the case was remanded, it will not reach this objection.

VI. CONCLUSION

Based on the above, the Commission affirms the result of its December 6, 2001 order approving the proposed tariff sheets filed by Sprint (Tariff File No. 200200318).

IT IS THEREFORE ORDERED:

1. That the Commission affirms its Order Regarding Tariffs and Motion to Suspend issued December 6, 2001.
2. That any motions not specifically ruled upon are denied.
3. That this order shall become effective on January 2, 2005.
4. That this case may be closed after January 3, 2005.

Murray, Clayton, Davis and Appling, CC., concur Gaw, Ch., dissents

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements: Consideration upon Remand from the United States District Court.*

*Case No. TO-2005-0037
Decided December 28, 2004*

Telecommunications §§ 45, 46. In determining the rates that an incumbent local exchange carrier could charge for the lease of certain unbundled network elements, the Commission determined that a capital structure containing 70 percent equity and 30 percent debt was appropriate for determining the weighted cost of capital for a hypothetical company exclusively in the business of selling unbundled network elements.

Telecommunications §§ 45, 46. While the Commission may amend the terms of the model M2A agreement, it does not have authority to summarily amend the interconnection agreements between parties who have previously adopted the M2A.

REPORT AND ORDER

SUMMARY

This report and order directs SBC to determine new rates for unbundled network elements by rerunning its cost studies using a weighted average cost of capital determined using a capital structure that includes 70 percent equity and 30 percent debt, along with a 13 percent cost of equity and a 7.18 percent cost of debt.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On August 6, 2002, in Case Number TO-2001-438, the Commission issued a report and order that decided some 356 separate issues identified by the parties regarding the prices that Southwestern Bell Telephone Company – now known as Southwestern Bell Telephone, L.P. d/b/a SBC Missouri – would be allowed to charge competitive local exchange carriers for the use of SBC's unbundled network elements. The August 6, 2002 report and order did not itself establish any prices, but ordered SBC to rerun its cost studies in compliance with the decisions in the

* See page 242 for another order in this case.

report and order, to develop actual prices. SBC did so, and filed the resulting prices with the Commission. The Commission approved those prices in an order effective on June 27, 2003.

SBC was dissatisfied with parts of the Commission's decision in TO-2001-438 and appealed to the U.S. District Court for the Western District of Missouri on July 16, 2003. SBC challenged the Commission's determinations regarding (1) SBC's capital structure; (2) SBC's "fallout factor"; and (3) the cost of sixteen particular network elements. On June 17, 2004, the District Court ruled on SBC's motion for summary judgment. The court denied SBC's motion regarding the fallout factor and the cost of the particular network elements, but granted the motion regarding the capital structure that the Commission had ascribed to SBC. The court vacated the Commission's capital structure determination and remanded the case to the Commission for "reconsideration of the appropriate capital structure and resulting rates." After receiving the remand from the District Court, the Commission opened this case on August 3, 2004, to reconsider the remanded issue.

After hearing arguments from the parties regarding the actions the Commission would need to take to reconsider the remanded issue, the Commission determined that it would not accept new evidence regarding SBC's capital structure and would instead make its decision based on the record established in Case Number TO-2001-438. The Commission directed the parties to file briefs by November 29.

The following parties filed briefs on November 29: SBC Missouri; the Staff of the Commission; McLeodUSA Telecom Services, Inc.; and a group of competitive local exchange carriers referring to themselves simply as the CLECs.¹ The Pager Company d/b/a The Pager and Phone Company filed an Amicus Curiae Brief on November 29, along with a motion for leave to file such brief. No party has objected to that motion and it will be granted.

Capital Structure

The District Court vacated the Commission's determination of the appropriate capital structure to use in the calculation of the rates that SBC will be allowed to charge CLECs that wish to lease unbundled network elements from SBC's telecommunications network. Capital structure is one of the elements, along with the average cost of debt and the average cost of equity, used to determine the company's weighted average cost of capital. The weighted average cost of capital is then one factor used to determine SBC's cost to provide those unbundled network elements.

The formula for determining weighted cost of capital is:

(forward-looking cost of debt x percentage of debt in the capital structure) + (forward-looking cost of equity x percentage of equity in the capital structure) = weighted average cost of capital.

¹ The CLECs that joined in this brief are NuVox Communications of Missouri, Inc., XO Missouri, Inc., Allegiance Telecom of Missouri, Inc., MCI WorldCom Communications, Inc., MCImetro Access Transmission Services, LLC., AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, and Covad Communications Company.

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The Commission must determine three factors to be used in that formula: the cost of debt, the cost of equity, and the percentage of each in the capital structure.

In its August 2002 report and order, the Commission determined that SBC's average cost of debt is 7.18 percent and that its average cost of equity is 13 percent. Those determinations were not appealed and will not be revisited in this report and order. The Commission's August 2002 report and order required the use of a capital structure including 54 percent equity and 46 percent debt. That capital structure was rejected by the District Court and must be revisited in this report and order.

SBC, like most businesses, is financed by a combination of equity (common stock) and debt (including bonds and bank loans). The relative percentage of debt and equity used to finance a business is referred to as its capital structure. A company's capital structure will vary depending upon the nature of the company's business and the perception of investors regarding the risks associated with that business.

There are two sources of risk for a company: operating risk and financial risk. Operating risk results from the operation of the business. It is affected by factors such as competition, technological change, customer acceptance of a company's products, and variation in the costs of producing the company's products.² Financial risk is determined by the amount of debt in a company's capital structure. A company heavily financed with debt is perceived by lenders to be more financially risky than a company financed with equity. Debt must be serviced on a prescribed schedule; whereas, a company has much more flexibility in determining the amount of dividends that it will pay to its equity holders. Taking on more debt increases the risk that a company will not be able to meet its fixed obligation to service its debt; thus increasing the financial risk of the company.

In deciding whether to invest in either the debt or equity of a company, investors will consider the total risk – both operating and financial – associated with the company. Therefore, a company with low operating risk may be able to take on greater financial risk and still have a favorable total risk that would be attractive to investors. That means that a company operating in a relatively stable business environment will be able to finance more of its costs through cheap, but risk increasing, debt. A company subject to greater business risks must finance a greater percentage of its costs through higher priced, but less risky equity.

The question of an appropriate capital structure for a company that only leases unbundled network elements on a wholesale basis is complicated by the fact that no such company exists in the real world. The companies that actually lease unbundled network elements are incumbent local exchange carriers, such as SBC, and they are engaged in many other businesses, in addition to leasing unbundled network elements. However, under TELRIC standards, the CLECs that lease unbundled network elements should not be required to pay for risks associated with other aspects of SBC's business. The Commission is therefore

² Hirshleifer Rebuttal, Exhibit 29, Page 7, Lines 14-18.

required to determine the cost of capital for a hypothetical version of SBC that is only in the business of leasing unbundled network elements to CLECs at wholesale.

In its August 2002 report and order, the Commission concluded that a capital structure of 54 percent equity and 46 percent debt would be ascribed to SBC for purposes of leasing unbundled network elements. That determination was based on the testimony of Staff's witness Dr. Ben Johnson who testified that an appropriate capital structure for the hypothetical unbundled network elements wholesale provider could best be determined by using book value rather than market value for SBC's equity. The Commission accepted Johnson's contention that the use of a book value capital structure for the hypothetical unbundled network elements wholesaling company would more closely approximate the monopolistic business of wholesale provisioning of unbundled network elements rather than the riskier business undertaken by telephone holding companies in the modern competitive environment.

On appeal, however, the District Court found that the capital structure accepted by the Commission, which was based on the book value of SBC's stock, improperly considered embedded costs rather than forward-looking costs reflective of the existence of competition in the telecommunications market. The court specifically held that the Commission could not use SBC's book values even as a starting point for determining the appropriate capital structure. Therefore, on remand, the Commission must reject the capital structure testimony of Staff's witness.

In addition to Staff's witness' testimony on capital structure, which must be rejected, the record contains testimony from two witnesses regarding capital structure. SBC's witness Dr. William Avera recommended a capital structure containing 86 percent equity and 14 percent debt. Avera based his recommendation on the average market-based capital structure – measured as of December 31, 1998 – of a group of seven local exchange companies that he found to be comparable to SBC.³

The witness offered by the CLECs, John Hirshleifer, recommended a capital structure containing 65.5 percent equity and 34.5 percent debt. Mirroring Avera, Hirshleifer based his recommendation on the average capital structure of a group of comparable local exchange companies, although he measured his group as of June 30, 2000. That group of comparable companies showed a market-based capital structure containing 80 percent equity and 20 percent debt.

Hirshleifer did not stop there, however. He explained that the 80 percent equity and 20 percent debt average capital structure that he had measured was the average capital structure of a group of diversified telecommunications service providers similar to SBC. It was not a measurement of the capital structure of a company that exclusively provides unbundled network elements, because no such company exists. Hirshleifer argued that a hypothetical company that provides only unbundled network elements would be less risky than a more diversified company because the incumbent LEC controls the only available network from which unbundled network elements can be leased, and thus does not face competition

³ Avera Direct, Exhibit 1, Schedule 2, Page 21.

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for its services. A diversified company provides many services in a competitive market and thus faces more risk. Since the hypothetical company would face less risk, Hirshleifer contends that it could use more relatively cheap debt in its capital structure and still attract investment.

To account for this lesser risk for his hypothetical unbundled network elements provider, Hirshleifer adjusts his proposed capital structure by averaging the 20 percent market-based debt structure of his comparable group of incumbent LECs against the 49 percent book-value debt structure of the same comparable group of incumbent LECs. In this way, he arrives at a recommended capital structure containing 34.5 percent debt and 65.5 percent equity.⁴

Hirshleifer's proposed adjustment must be rejected because it uses embedded book value as the basis for deriving the capital structure of his hypothetical company. The District Court, in remanding this case, made it quite clear that the TELRIC methodology that this Commission must use in determining the rates that can be charged for the leasing of unbundled network elements, does not permit the use of historical book values. The District Court explicitly stated that FCC regulations⁵ do not permit a state commission to use an incumbent LEC's book values even as a starting point for cost of capital determinations.⁶ On that basis, the District Court rejected this Commission's initial determination of capital structure. Hirshleifer's method of adjusting his proposed capital structure would again use book values in its consideration of an appropriate capital structure. Based on the FCC's regulations, as explained by the District Court, that adjustment must be rejected.

However, while Hirshleifer's proposed capital structure is tainted by his use of book values and must be rejected, the problem that he identified with SBC's proposed capital structure still remains. The risks faced by the large holding companies included in either Hirshleifer's or Avera's comparable group of companies simply is not the same as the risk that would be faced by a hypothetical company that only leases unbundled network elements. Large telecommunications holding companies include many businesses that are much more risky than leasing unbundled network elements. For example, they offer risky services that include wireless communications, long distance services, internet services, cable television services, telecommunications equipment, messaging, paging, directory advertising and publishing, and international business efforts.⁷ It would be inappropriate and unfair to simply accept the capital structure recommended by Avera without making some adjustment for the differences in risk.

Since the capital structure of a hypothetical company that only leases unbundled network elements is necessarily hypothetical, there can be no single "correct" capital structure. The Commission must do its best to establish a level of debt and equity for this hypothetical capital structure that reflects the risk of providing unbundled network elements in a forward-looking, TELRIC-compliant

⁴ Hirshleifer Rebuttal, Ex. 29, Pages 3-4.

⁵ 47 CFR § 51.505(b)(1)

⁶ District Court Order, Page 7

⁷ Hirshleifer Rebuttal, Exhibit 29, Page 38, Lines 14-20.

environment. Based on its consideration of those factors, the Commission concludes that a hypothetical capital structure containing 70 percent equity and 30 percent debt is appropriate.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

1. The Commission has jurisdiction over this matter pursuant to Section 252 of the federal Telecommunications Act of 1996,⁸ which authorizes states to set rates for unbundled network elements that must be provided by certain incumbent local exchange companies including SBC.

2. SBC, as a provider of local exchange and intraLATA long-distance telecommunications service, is a "telecommunications company," as defined by Section 386.020(51), RSMo 2000, and a "public utility," as defined by Section 386.020(42), RSMo 2000. SBC is therefore subject to the jurisdiction of the Commission under Section 386.250(2), RSMo 2000. In the terms of the Telecommunications Act of 1996, SBC is a Bell operating company (BOC)⁹ and an incumbent local exchange carrier (ILEC).¹⁰

3. Each of the other telecommunications carriers that are parties to this proceeding is also a "public utility" and a "telecommunications company" as defined by Sections 386.020, (42) and (51), RSMo 2000, and is subject to the jurisdiction of this Commission under Section 386.250(2), RSMo 2000.

4. The pricing standard for the rates at issue in this case is established by the Federal Communications Commission in 47 C.F.R. Section 51.505.¹¹ That regulation requires that rates for unbundled network elements be based upon forward-looking economic costs. The FCC's rules prescribe a forward-looking cost methodology known as "total element long-run incremental costs" ("TELRIC"). "TELRIC" is defined in that regulation as:

(b) *Total element long-run incremental cost.* The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) *Efficient network configuration.* The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

⁸ 47 U.S.C. 252.

⁹ 47 U.S.C. 3(4)(A).

¹⁰ 47 U.S.C. 251(h)(1).

¹¹ A copy of this regulation was admitted into evidence as Exhibit 22.

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(2) *Forward-looking cost of capital.* The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) *Depreciation rates.* The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

5. 47 C.F.R. Section 51.505(c) defines a “reasonable allocation of forward-looking common costs” as:

(1) *Forward-looking common costs.* Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) *Reasonable allocation.* (i) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(ii) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC’s total network, so as to provide all the elements and services offered.

6. 47 C.F.R. Section 51.505(d) sets out the factors that may not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs.* Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC’s books of accounts;

(2) *Retail costs.* Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in §51.609;

(3) *Opportunity costs.* Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and

(4) *Revenues to subsidize other services.* Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

7. 47 C.F.R. §51.505(e) provides that:

An incumbent LEC must prove to the State Commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and §51.511.

This regulation means that SBC, as the incumbent LEC, has both the burden of production and the burden of persuasion on the issue of whether its proposed rates comply with the forward-looking TELRIC methodology prescribed by the FCC.

8. Any decision of the Public Service Commission must be both lawful and reasonable.¹² The lawfulness of a decision is determined from the statutory authority of the Commission.¹³ For a decision of the Commission to be reasonable, it must be supported by competent and substantial evidence on the whole record.¹⁴

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

Capital Structure

SBC will be directed to use a capital structure including 70 percent equity and 30 percent debt, along with the previously decided 13 percent cost of equity and the 7.18 percent cost of debt, to determine a weighted average cost of capital. SBC will then be directed to use that weighted average cost of capital to rerun its cost studies for those rates affected by the weighted cost of capital, to determine new rates for the affected unbundled network elements.

Retroactive Effect of the Revised Final Rates

The capital structure issue was the only issue remanded to this Commission by the District Court. As indicated, SBC will be directed to rerun its cost studies to arrive at revised rates that will then be included in the M2A that is available for adoption by interested CLECs. But the M2A is set to expire in March of 2005, so the revised rates that will result from this decision will have little prospective effect. The Commission was concerned about the prospective or retroactive effect of its order in this case and directed the parties to address that question in their briefs.

The parties disagree about whether the revised rates that will be established as a result of this case will have any retroactive effect. The CLECs and Staff contend

¹² *City of Oak Grove v. Pub. Serv. Com'n*, 769 S.W.2d 139, 141 (Mo. App. W.D. 1989).

¹³ *State ex rel. Intercon Gas. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1995).

¹⁴ *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997).

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that the revised rates will have a prospective effect only. SBC argues that the rate changes that will result from the revisions to the capital structure should apply back to correct the rates that the Commission set in its original order. SBC would, in effect, require a true-up going back to the date that the Commission's order establishing permanent rates was entered, June 17, 2003, plus an additional six months, to correct the true-up that was conducted at that time. That would result in a new true-up back to December 27, 2002. In other words, the rates that would result from the Commission's decision in this case would apply back to December 27, 2002, and the CLECs would be required to pay SBC the difference between those rates and the rates that were ordered in June 2003.

While ultimately the question of the retroactive effect of the rates established in this order may come back to the Commission for resolution, it may not be an issue that the Commission can finally resolve in this order. The purpose of this case is to establish permanent rates for certain UNEs to be included in the model interconnection agreement known as the M2A, and the Commission will do so. But, while the Commission can make changes to the model M2A, when that agreement is adopted to create an interconnection between a CLEC and SBC, it becomes a private contract between the companies. The Commission does not have the authority to summarily amend those existing interconnection agreements.

Those interconnection agreements contain various change-of-law provisions that may allow them to be revised to include the rates that will be established in this case. If SBC decides that revision of the rates contained in those interconnection agreements is needed, it may pursue such revisions in an appropriate forum, perhaps including before this Commission. However, not all the companies that have adopted the M2A for purpose of interconnecting with SBC are parties to this case, and the Commission cannot adjudicate their rights under those agreements without notice and an opportunity to be heard.

The Commission does not, however, believe that the language of the M2A allows for more than one true-up. That true-up took place in June 2003, after the Commission approved final rates in TO-2001-438. Consequently, this order, and the rates that will be established as a result of this order, will only have prospective effect.

IT IS THEREFORE ORDERED:

1. That the Petition of the Pager Company for Leave to File a Brief as Amicus Curiae is granted.
2. That Southwestern Bell Telephone, L.P. d/b/a SBC Missouri shall rerun its cost studies in compliance with the decisions set forth by the Commission in this report and order.
3. That no later than January 28, 2005, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri shall file the results of its revised cost studies and the UNE prices that result from those revised studies.
4. That any party that wishes to file a response to Southwestern Bell Telephone, L.P. d/b/a SBC Missouri's filing pursuant the previous paragraph shall do so not later than February 28, 2005.
5. That this Report and Order shall become effective on January 7, 2005.

Gaw, Ch., Clayton and Appling, CC., concur;
Murray and Davis, CC., dissent, with
dissenting opinion attached;
certify compliance with the provisions of
Section 536.080, RSMo 2000.

**DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY
AND COMMISSIONER JEFF DAVIS**

We disagree with the majority's decision to use a hypothetical capital structure of 70 percent equity and 30 percent debt. We believe the evidence supports a hypothetical level of 80 percent equity and 20 percent debt.

The evidence does not indicate that a hypothetical company that only leases unbundled network elements would be less risky than a diversified LEC. To the contrary, such a company might well be more risky. Although a provider of unbundled network elements would not face competition, it would face regulatory risk, as the rates it could charge would be determined in a regulatory proceeding. Furthermore, the very fact that such a company would be providing only one service would tend to increase its risk relative to a large diversified company that provides many services to many customers.

Therefore, it is inappropriate to adjust the hypothetical capital structure for differences in risk, as the majority did. Hirshleifer's proposed capital structure, unadjusted by any consideration of embedded book values, is based on an evaluation of essentially the same comparable companies as those used by SBC's witness. While SBC recommended a capital structure of 86 percent equity and 14 percent debt, we would give more weight to Hirshleifer's study because it used more current information. We believe the evidence supports the unadjusted capital structure of 80 percent equity and 20 percent debt proposed by Hirshleifer.

Therefore, we respectfully dissent.

In the Matter of the Application of Kansas City Power & Light Company for Approval to Amend the Nuclear Decommissioning Trust Agreement.

*Case No. EO-2004-0590
Decided December 30, 2004*

Accounting §5. Having found it to be in the public interest, the Commission approved a stipulation and agreement. Pursuant to the Agreement, Kansas City Power & Light Company's nuclear decommissioning trust agreement is changed in order to be consistent with 10 CFR 50.75(h)(1)(iv), promulgated by the Nuclear Regulatory Commission. The change provides for ordinary expenses to be distributed from the decommissioning trust without prior notification.

Electric §27. Having found it to be in the public interest, the Commission approved a stipulation and agreement. Pursuant to the Agreement, Kansas City Power & Light Company's nuclear decommissioning trust agreement is changed in order to be consistent with 10 CFR 50.75(h)(1)(iv), promulgated by the Nuclear Regulatory Commission. The change provides for ordinary expenses to be distributed from the decommissioning trust without prior notification.

Electric §45. Kansas City Power and Light Company filed an application for approval of changes to its nuclear decommissioning trust agreement to make it consistent with the rule promulgated by the Nuclear Regulatory Commission (NRC). This rule, 10 CFR 50.75(h)(1)(iv), provides for administrative costs of operating the decommissioning trust fund to be disbursed without prior notification to the NRC. The Commission approved the application with the conditions found in the parties' Unanimous Stipulation and Agreement.

ORDER APPROVING STIPULATION AND AGREEMENT

On May 20, 2004, Kansas City Power & Light Company filed an application for approval of changes to its nuclear decommissioning trust agreement to make it consistent with the rule promulgated by the Nuclear Regulatory Commission ("NRC"). This rule (10 CFR 50.75(h)(1)(iv)) provides for ordinary administrative costs of operating the decommissioning trust fund to be disbursed without prior notification to the NRC.

On December 10, the parties filed a unanimous stipulation and agreement resolving all issues raised by the application. The salient provisions of the agreement are that KCPL agrees to continue to submit quarterly decommissioning trust fund reports pursuant to Section 393.292, RSMo 2000, 4 CSR 240-20.070 and Case No. EO-2000-210. In addition to the information currently provided in the quarterly reports, KCPL agrees to provide additional information regarding ordinary administrative costs and other incidental expenses of the trust. KCPL also agrees to provide an annual projection of ordinary administrative costs and other incidental expenses, other than income taxes, that will be paid from the trust fund.

The Commission has considered the application, the unanimous stipulation and agreement, and all the pleadings. The Commission finds approving the agreement and the underlying application is in the public interest. The Commis-

sion will approve the agreement and grant MGE the service authority requested in the agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on December 10, 2004, is approved, and the parties shall carry out the terms and requirements therein.
2. That the application for approval of changes in the nuclear decommissioning trust agreement filed by the Kansas City Power & Light Company on May 20, 2004, is granted as conditioned by the terms of the Stipulation and Agreement filed on December 10, 2004.
3. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions, and expenditures, herein involved.
4. That the Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions, and expenditures herein involved in a later proceeding.
5. That this order shall become effective on January 9, 2005.
6. That this case may be closed after January 10, 2005.

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur

Mills, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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**Staff of the Missouri Public Service Commission Complainant,
v. AT&T Communications of the Southwest, Inc., Respon-
dent.**

*Case No. TC-2005-0205
Decided January 4, 2005*

Rates §80. The Commission approved a Stipulation and Agreement between AT&T Communications of the Southwest and the Staff of the Commission. AT&T erroneously billed customers a \$3.95 monthly recurring charge. The Commission closed the case after AT&T fixed the coding and systems processing errors that caused the monthly charge. In addition, AT&T provided 2,000 AT&T Prepaid Calling Cards to families of the Missouri National Guard reservists.

Telecommunications §14. The Commission approved a Stipulation and Agreement between AT&T Communications of the Southwest and the Staff of the Commission. AT&T erroneously billed customers a \$3.95 monthly recurring charge. The Commission closed the case after AT&T fixed the coding and systems processing errors that caused the monthly charge. In addition, AT&T provided 2,000 AT&T Prepaid Calling Cards to families of the Missouri National Guard reservists.

Telecommunications §33. The Commission approved a Stipulation and Agreement between AT&T Communications of the Southwest and the Staff of the Commission. AT&T erroneously billed customers a \$3.95 monthly recurring charge. The Commission closed the case after AT&T fixed the coding and systems processing errors that caused the monthly charge. In addition, AT&T provided 2,000 AT&T Prepaid Calling Cards to families of the Missouri National Guard reservists.

ORDER APPROVING STIPULATION AND AGREEMENT

On January 3, 2005, the Staff of the Commission filed a Motion to Open Case, Approve Stipulation and Agreement, and Motion for Expedited Treatment. As an attachment to that pleading, Staff filed a Stipulation and Agreement entered into by Staff and AT&T Corp., acting on behalf of itself and its affiliates.

In its motion, Staff states that it began receiving complaints about AT&T erroneously billing customers (and consumers who were not AT&T customers) a \$3.95 charge. Staff states that it has reached a settlement with AT&T that would settle all issues related to the erroneous billing.

As its part of the agreement, AT&T acknowledges its billing error, and commits to certain actions. AT&T acknowledges that it erroneously charged 29,165 Missouri consumers the \$3.95 charge. AT&T represents that it has processed refunds or bill credits in the total amount of \$285,147 for the Missouri erroneously charged, and sent each effected customer a letter of apology. AT&T also represents that it has rectified the coding and systems processing errors that caused the monthly recurring charge billing errors.

In addition, AT&T agrees to provide to the Missouri National Guard two thousand AT&T Prepaid Calling Cards so that they can be distributed to the families of

Missouri National Guard reservists shown in the records of the Missouri National Guard as staged to go or deployed and on active duty in the country of Iraq as of December 15, 2004. Each card will allow approximately 3 hours of calling time within the United States, or approximately 17 minutes of calling time from the United States to Iraq. Outside of the agreement, AT&T has volunteered to provide an additional one thousand cards.

For its part of the agreement, Staff agrees that it will neither seek administrative penalties nor take other enforcement actions against AT&T with regard to AT&T's erroneous billing of the \$3.95 monthly recurring charge to Missouri consumers that began in or about January 2004 and was rectified before the date of this Stipulation and Agreement.

The agreement also notes that, contemporaneously with its filing, AT&T has reached an agreement with the Missouri Attorney General under Missouri's merchandising practices laws (Sections 407.010 RSMo 2000 *et seq.*).

The Commission finds that the agreement is a reasonable resolution of the issues raised, and will approve it.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on January 3, 2005, is approved, and the parties shall carry out the terms and requirements therein.
2. That this order shall become effective on January 14, 2005.
3. That this case may be closed after January 15, 2005.

Murray, Clayton, Davis and Appling, CC., concur
Gaw, Ch., not participating

Mills, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of Laclede Gas Company's Tariff to Revise Natural
Gas Rate Schedules.***

*Case No. GR-99-315
Decided January 11, 2005*

Accounting §17. In the Commission's January 11, 2005, Third Report and Order, it finds that the goal of depreciation accounting is to calculate the amount the customer pays, proportionate to the benefit the utility customer receives, to cover the full cost of an asset from which they receive service.

Depreciation §§ 10, 13. The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to calculate the net salvage value. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.

Depreciation §22. The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to calculate the net salvage value. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.

Depreciation §32. The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support changing the accrual method. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.

Evidence, Practice and Procedure §14. Staff provided no evidence to support that the recommended change in the accrual method of net salvage was more reasonable than the current depreciation method, which is consistent with the Uniform System of Accounts adopted by the Commission.

Expense §37. Staff provided no evidence to support that the recommended change in the accrual method of net salvage was more reasonable than the current depreciation method, which is consistent with the Uniform System of Accounts adopted by the Commission.

Gas §27. The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support changing the accrual method. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.

Gas §54. The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support changing the accrual method. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.

Valuation §71. The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support that the recommended change in the accrual

* This order contains changes approved by the Commission on January 12, 2005. See p. 436, Volume 8, MPSC 3d and p. 361, Volume 10, MPSC 3d for other orders in this case.

method of net salvage was more reasonable than the current depreciation method, which is consistent with the Uniform System of Accounts adopted by the Commission. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.

APPEARANCES

Michael C. Pendergast, Vice President and Associate General Counsel, and *Rick Zucker*, Assistant General Counsel—Regulatory, Laclede Gas Company, 720 Olive Street, St. Louis, Missouri 63101, for Laclede Gas Company.

James B. Lowery, Smith Lewis, LLP, Suite 200, City Centre Building, 111 South 9th Street, Post Office Box 918, Columbia, Missouri 63205-0918,
and

Thomas M. Byrne, Associate General Counsel, Ameren Services Company, One Ameren Plaza, 1901 Chouteau Avenue, Post Office Box 66149 (MC 1310), St. Louis, Missouri 63166-6149, for Union Electric Company d/b/a AmerenUE.

M. Ruth O'Neill, Senior Public Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Thomas R. Schwarz, Jr., Deputy General Counsel, Missouri Public Service Commission, 200 Madison Street, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: *Nancy Dippell*, Senior Regulatory Law Judge.

THIRD REPORT AND ORDER

Syllabus: This order finds that the accrual method should be used to calculate Laclede's net salvage value and that Laclede should establish a separate account on its books for tracking these expenditures and collections.

Overview

Because this order contains detailed findings spanning two hearings and almost six years, a summary will be helpful. The only issue remaining from Laclede's 1999 general rate case is the proper calculation of net salvage, and that is the only issue resolved herein. Unlike the first two Reports and Orders in this case, in this order the Commission finds that the evidence presented dictates a finding in favor of Laclede rather than in favor of Staff.

This order begins with a brief procedural history that explains the two appeals and the currently pending procedural matters. Next is the section detailing the Commission's findings of fact that support its ruling in favor of Laclede, followed by the conclusions of law in which the Commission applies the law to these findings.

Procedural History

Following decisions by the Circuit Court of Cole County and the Missouri Court of Appeals,¹ this matter now comes before the Commission on remand.

¹ *State of Missouri ex rel. Laclede Gas Company And Union Electric Company d/b/a AmerenUE v. Public Service Commission*, 103 S.W.3d 813 (Mo. App., W.D. 2003).

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A Report and Order in this case was issued on December 14, 1999. An Order of Clarification was issued on December 21, 1999, and an Order Approving Tariffs was issued December 23, 1999. On December 1, 2000, the Circuit Court of Cole County remanded the case to the Commission for "findings of fact sufficient to support resolution of the net salvage issue."

The Commission issued its Second Report and Order on June 28, 2001. That order was appealed to the Circuit Court of Cole County and then to the Court of Appeals for the Western District of Missouri. On May 28, 2003, the Court of Appeals issued its Mandate to Cole County Circuit Court with directions to the Circuit Court to remand the decision. On May 30, 2003, the Circuit Court entered a docket entry stating that the case was remanded to the Commission "with instructions to provide clearer, more detailed findings of fact that include the rationale for the findings and comply with 386.420 and 536.090, RSMo 2000."

As a result of the remand by the Western District Court of Appeals, the Commission determined that this proceeding should be reopened to take further evidence on the issue of net salvage and depreciation. On September 22-24, 2004, a further hearing was held on the net salvage issue. All the parties were represented at the hearing. Briefs were filed on November 2, 2004.

Pending Motions

On May 14, 2004, after the Commission set this matter for further evidentiary hearing, Laclede filed a motion for reconsideration and an alternative recommendation that a generic case regarding depreciation be established. The parties jointly filed a proposed procedural schedule on June 14, 2004, in which Laclede requested that its pending motion for reconsideration and recommendation for a generic case be held in abeyance until after the completion of this proceeding. On that same date, Staff and Public Counsel filed responses to Laclede's motions suggesting that the motion for reconsideration be denied. Public Counsel also included a request that the Commission determine if the issue of net salvage is now moot given that Laclede has adopted new tariffs since this case was originally decided and would be unable to adjust its rates if the Commission finds in its favor.

On June 21, 2004, Laclede filed a reply to Staff and Public Counsel's responses. Laclede again reiterated that it had intended the Commission to hold its motions in abeyance if the Commission adopted a procedural schedule in this matter. The Commission adopted the parties' proposed procedural schedule on June 24, 2004, but indicated that it would address the pending motions in a separate order.

On July 29, 2004, the Commission directed the parties to file briefs on whether the issue in this case was moot. Those briefs were filed on August 18, 2004.

On August 25, 2004, Laclede and AmerenUE filed a response to the briefs of Staff and Public Counsel. On August 31, 2004, both Staff and Public Counsel filed motions requesting permission to be allowed to file responses to Laclede's brief one day out of time citing to Commission rule 4 CSR 240-2.080. Simultaneously with those motions, the Staff and Public Counsel filed their responses. On September 3, 2004, Laclede and AmerenUE objected to the motion, requested that Staff and Public Counsel's responses be stricken, and replied to those responses.

The Commission's rule 4 CSR 240-2.080(15) provides that "[p]arties shall be allowed not more than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission." Rule 4 CSR 240-2.010(13) specifically excludes briefs from the definition of "pleading." Therefore, the Commission finds that rule 4 CSR 240-2.080(15) does not apply in this situation. Furthermore, neither Laclede nor AmerenUE were harmed by the additional filing and, in fact, had sufficient time to file yet another reply. The Commission will accept the filings, grant Staff and Public Counsel's motions, and deny Laclede's motion to strike.

On December 9, 2004, Laclede filed a Request Regarding Accounting Adjustment to Implement Depreciation Rates. On December 17, 2004, both Staff and Public Counsel filed motions to strike the pleading from consideration or, in the alternative, responses to the motion. In their motions, Staff and Public Counsel argue that Laclede should not be allowed to supplement its arguments after the close of the briefing schedule and in response to the Commission's deliberations.

The Commission has struggled with the timing of the remaining issues throughout the remanded portion of this case. While it is true that a proper request from Laclede would have included a request for leave to make such a filing, the Commission finds that neither Staff nor Public Counsel have alleged any harm from the pleading. And, in fact, the final arguments from both sides have helped to clarify the issue. Therefore, the Commission will grant Laclede leave to file its pleading and deny the motions to strike it from consideration.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. The Commission adopts its previous Report and Order and Second Report and Order except as modified by these findings. The Commission notes that it may take notice of facts outside the record in determining mootness.²

The Commission finds that the gas service rates approved in Case No. GR-99-315 became effective on December 27, 1999.³ Those rates remained in effect until December 1, 2001, when they were superseded by the gas service rates approved by the Commission in Case No. GR-2001-629.⁴ Those rates remained effective until November 9, 2002, when they were superseded by the natural gas

² *State ex rel. Monsanto Co. v. Public Service Commission*, 716 S.W.2d 791, 793 (Mo. banc 1986); *State ex rel. Donnell v. Searcy*, 347 Mo. 1052, 152 S.W.2d 8, 10 (Mo. banc 1941).

³ *Order Approving Tariff Sheets Filed in Compliance with Commission's Order*, Case No. GR-99-315 (issued December 23, 1999).

⁴ *Order Approving Unanimous Stipulation and Agreement, etc.*, Case No. GR-2001-629, *supra*.

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service rates set in Case No. GR-2002-356,⁵ which rates are currently in effect.

In this Report and Order, the Commission cites primarily to the testimony from the following witnesses:⁶

Paul Adam, a Staff witness who testified at the first hearing in 1999;

Rosella Schad, a Staff witness who adopted Mr. Adam's testimony and testified at the second hearing in 2004;

William Stout, a Laclede witness who testified at the second hearing in 2004.

Throughout the two hearings held in this case, the parties have had a fundamental disagreement on the proper method for calculating net salvage costs when establishing depreciation rates. It is undisputed that the accrual method used by Laclede to determine the net salvage component of its depreciation rates has traditionally been used by both the Commission and the Company to establish the Company's depreciation rates.⁷

Because Laclede is the moving party in this case, as a utility requesting a rate increase, it has the ultimate burden of proof. However, as noted above, Staff is the party advocating a change in the depreciation method used not only by Laclede, but almost all utilities in the country. As a result, much of this order discusses support for Staff's challenge to what has been referred to as the standard method of calculating net salvage.

Under the accrual method, the depreciation rate for a particular asset or group of assets is calculated as follows:⁸

$$\text{Depreciation Rate} = \frac{100\% - \% \text{ Net Salvage}}{\text{Average Service Life (years)}}$$

In this formula, net salvage equals the gross salvage value of the asset minus the cost of removing the asset from service.⁹ The net salvage percentage is determined by dividing the net salvage experienced for a period of time by the original cost of the property retired during that same period of time.¹⁰ The Commission finds that many natural gas assets will have a negative net salvage value and corresponding negative net salvage value percentage, since the cost of removing the asset from service frequently exceeds its gross salvage value.¹¹

The accrual method has been used by Laclede and the Commission to determine Laclede's depreciation rates since at least the early 1950s.¹² It is

⁵ *Order Approving Tariffs in Compliance with Commission Order*, Case No. GR- 2002-356 (issued November 8, 2002).

⁶ The Commission also admitted into evidence and has considered testimony (or depositions in lieu of testimony) from several other witnesses, e.g., Mark Oligschlaeger, a Staff witness; Steven Fetter, R. Lawrence Sherwin, Warner Baxter, and Barry Cooper, witnesses for Laclede and Ameren.

⁷ Exh. No. 23, p. 4.

⁸ Exh. 23, p. 4.

⁹ *Id.*

¹⁰ Exh. 23, pp. 4-5.

¹¹ Exh. 23, p. 9; Schedule 1.

¹² Tr. 1733.

undisputed that using the accrual method for this purpose is supported by the overwhelming weight of authority on such matters. In both evidentiary hearings, Laclede and AmerenUE provided evidence showing the widespread support among depreciation professionals and authoritative texts for the traditional, or accrual, method of treating net salvage.¹³

Laclede and AmerenUE also established, and no party disputed, that such a method is consistent with the requirements of the Uniform System of Accounts that this Commission has adopted, and depreciation practices recognized and followed in all but a few regulatory jurisdictions in the United States.¹⁴ In contrast, Staff was unable to cite any depreciation practitioner, outside of other Staff members, or any depreciation treatise that addressed its proposed treatment of net salvage. In addition, Staff was unable to adequately support or explain its reasoning for adopting this new approach.

During the first evidentiary hearing, Mr. Adam agreed that a proper goal of depreciation is to allocate the full cost of an asset, including its net salvage cost, over the useful life of the asset.¹⁵ He did not, however, provide any evidence to demonstrate that this goal is not achieved by the accrual method traditionally used by the Commission and employed by Laclede in this case.

The Commission finds that the fundamental goal of depreciation accounting is to allocate the full cost of an asset, including its net salvage cost, over its economic or service life so that utility customers will be charged for the cost of the asset in proportion to the benefit they receive from its consumption.¹⁶ The Commission further finds that the method utilized by Laclede is consistent with that fundamental goal.

In criticizing the accrual method for determining net salvage, Staff did show that Laclede is recovering more in depreciation for net salvage than it is currently spending.¹⁷ Ratepayers pay \$2.3 million more in depreciation annually under the accrual method than under Staff's proposed expense method.

Laclede explained this result, however, with evidence showing a consistent and significant upward trend over time in both the installation cost of the plant used by Laclede to provide utility service, as well as in the cost to remove such plant from service.¹⁸ In fact, just maintaining the net salvage percentage at its historical rate would result in a higher level of net salvage costs than that currently being realized by the Company, since it applies to an asset base that has grown and continues to grow over time. For example, the evidence shows that in 1950 Laclede's total plant in service was only 6 percent of what it is today.¹⁹

¹³ Exh. 23, p.3; Exh. 25, pp. 4-6; Exh. 26, pp. 4-5; Exh. 136, p. 9.

¹⁴ Exh. 26, pp. 2, 4-5, 13; Exh. 143, p. 7; Exh. 135, pp. 7-9; Exh. 143, pp. 6-7.

¹⁵ Tr. 895-896.

¹⁶ Exh. 23, p. 3; Exh. 25, p.7; Exh. 26, p. 4.

¹⁷ Exh. No. 92, p. 7.

¹⁸ Exh. 23, pp. 21-26; Exh. 25, p. 9; Tr. 841.

¹⁹ Ex. 136, Schedule WMS-3-1.

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The Commission has also seen no evidence to suggest that the net salvage costs calculated under the accrual method are not sufficiently reliable. Laclede and AmerenUE pointed to evidence showing that estimates are frequently used in the ratemaking process for deriving returns on equity, allowable pension costs, nuclear decommissioning allowances, and the service lives over which the recovery of capital costs are spread.²⁰ Staff, on the other hand, provided no evidence to show that the net salvage estimates derived under the accrual method are any less reliable, known and measurable, or trustworthy than the estimates used in these other ratemaking calculations.²¹

The estimates are derived through the use of estimating techniques that reflect the continuing impact of factors such as inflation that cause costs to rise. These estimates also reflect the growth in plant that has continued to occur over the last several decades. Two of the depreciation witnesses for Laclede used historical data to demonstrate that recognition of growth factors should continue into the future.²² Moreover, both the rate of return witness for the Company and the rate of return witness for Staff presented evidence showing that some level of inflation can be expected to continue in the future.²³

The Commission finds no substantive evidence showing that net salvage costs, as determined under the accrual method, have been calculated erroneously. Although Mr. Adam testified in his direct testimony that net salvage costs had been miscalculated, he later acknowledged in a data request response to the Company, as well as during cross-examination, that no such miscalculation had occurred.²⁴ Instead, Mr. Adam indicated that the difference between his net salvage calculation and that of the Company's was simply attributable to the fact that they were employing different methods to make that calculation.²⁵

The Commission also notes that the use of estimating techniques is critical to determining the average service lives of a utility's assets under both the methods proposed in this case, to spread and defer the utility's recovery of current capital expenditures over many years into the future.²⁶ Ms. Schad acknowledged that average service life estimates may vary, are dynamic, and depend on the judgment of the depreciation analyst, factors which all indicate that estimates of net salvage are no less reliable than the estimates of average service lives.²⁷

The Commission finds that no evidence or satisfactory explanation exists as to why it is inappropriate or unreasonable to use estimates for purposes of determining net salvage costs, but is appropriate to use them for deriving equity

²⁰ Tr. 1845-47; Exh. 136, p. 25; Exh. 137, p. 10.

²¹ Tr. 2039-40; Exh. 157, p.103; Exh. 156, p. 60.

²² Tr. 841; Exh. 23, pp. 18-23; Exh. 25, p. 9, Schedule 1.

²³ See, Tr. 841; Exh. No. 2, pp. 4, 7, 10-11, 19-21, D-6, Schedule 8; Exh. No. 59, pp. 9-17, Schedules 4 and 7.

²⁴ Tr. 884-885.

²⁵ *Id.*

²⁶ Tr. 841; Exh. 23, pp. 8-10.

²⁷ Tr. pp. 1549-1550.

returns, allowances for pension costs, decommissioning costs, and the service lives used to allocate the recovery of up-front capital expenditures over many years. Given these considerations, the Commission finds that Laclede's net salvage estimates as derived under the accrual method are reasonable.

The Commission is also not persuaded that the method proposed by Staff will resolve an intergenerational problem. Although Mr. Adam initially testified that his method would address an intergenerational problem, he later conceded on cross-examination that he wished he had not made that claim.²⁸ In fact, Mr. Adam acknowledged on cross-examination that to address any intergenerational problem, customers benefiting from the use of an asset should pay for its costs of removal during the service life of the asset, not after it is retired from service.²⁹ Since it is clear from the evidence in this case that the accrual method comes closer to matching the costs to the benefits derived,³⁰ the Commission finds that intergenerational equity will be promoted by the continued use of the accrual method.

Laclede's evidence shows that because the accrual method incorporates net salvage costs as a part of the depreciation rate, any difference between actual and estimated net salvage costs will be reflected in adjustments to the depreciation reserve.³¹ The depreciation reserve, in turn, acts as a kind of balancing account that tracks over- and underaccruals of net salvage costs. In this way, the depreciation rates can be subsequently adjusted to ensure that the utility will not over- or undercollect such costs and that the ratepayer will not over- or underpay for such costs.³² The Commission's rule requiring the submission of depreciation studies no less frequently than every five years provides a mechanism for monitoring the depreciation reserve so that this balancing can occur. At no point did the Staff dispute the fact that the accrual method operates in this manner.

The evidence also showed that any temporary difference between estimated and actual net salvage costs is reflected in the depreciation reserve that, in turn, is deducted from the utility's rate base pursuant to standard Commission practice.³³ As a result, ratepayers are compensated at the utility's overall rate of return for the "use" of their money during those times when the utility's outlays for net salvage are less than what has been included in depreciation rates.³⁴ In contrast, in the Staff's expense method, any difference between its estimates of net salvage costs and actual net salvage costs are either absorbed by the utility or borne by the customer.³⁵

²⁸ Tr. 896.

²⁹ *Id.*

³⁰ Exh. No. 25, pp. 6-8.

³¹ Exh. 138, p. 19.

³² Exh. 138, pp. 19-20.

³³ Exh. 138, p. 21.

³⁴ *Id.*

³⁵ Exh. 138, p. 21.

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The Commission also finds that Staff's method significantly decreases the cash flows available to utilities to meet their infrastructure and other public service obligations.³⁶ This, in turn, has a negative financial impact on both the utility and its customers by requiring that such obligations be met with more expensive sources of external financings and by driving up the cost generally of obtaining money in the capital markets.³⁷ The Commission finds that Staff has not shown that the adoption of its method would justify these increased costs for utility consumers.

Finally, the Commission is concerned about making such a significant change in its policies based on the lack of clear reasoning presented by Staff. The Commission notes that Mr. Adam's proposal was not reviewed by other Staff members prior to being filed, and that the workpapers supporting Staff's proposed method were never included with Mr. Adam's prefiled testimony, but were only offered into the record upon conclusion of Mr. Adam's cross-examination.³⁸ It is also clear from the discussion of those workpapers that Mr. Adam adopted his method by simply scratching out the salvage values he had calculated using the accrual methodology and substituting instead lower net salvage values, based on apparently nothing more than his realization that his original set of values yielded higher dollars in net salvage accruals to the Company than those actually incurred by the Company in recent periods.³⁹ Although given the opportunity after the record was reopened, Staff did not present additional evidence sufficient to support its position. These factors lead the Commission to find that Staff has not supported and explained its proposed method with the degree of thoroughness necessary to justify a significant departure from the Commission's traditional policy in this area.

The Commission is also concerned about whether the "safeguards" are sufficient to protect ratepayers from overcollection. Mr. Stout testified that the accrual approach would create a depreciation reserve substantially larger than the annual net salvage costs of recent retirements.⁴⁰ Mr. Stout further testified that these amounts would meet around the year 2020 and that the "safeguards" will correct it.⁴¹ To ensure that ratepayers are protected, the Commission shall adopt a portion of the additional recommendation that Staff proposed.

The Commission finds that Laclede should not be required to segregate the net salvage amounts collected in rates from other corporate funds.⁴² The Commission is persuaded that such a requirement is unnecessary given the absence of any evidence showing that utilities have ever failed to pay for such costs when they arose, the existence of other financial protections, including those imposed in

³⁶ Exh. 134, pp. 8-10.

³⁷ Exh. 134, p. 9.

³⁸ Tr. 929.

³⁹ Tr. 889-892; Exh. No. 124.

⁴⁰ Tr. 1425-26.

⁴¹ *Id.*

⁴² Exh. 142, pp. 12-13.

connection with Laclede's financing authorizations, and the fact that other costs that have been precollected in rates have not required such a safeguard.⁴³ The Commission also finds that such a requirement would be unwise, because it would tend to increase costs for utility customers by providing less compensation to consumers for the use of their money than does the accrual method.⁴⁴

Laclede agreed, however, to accept that portion of Staff's proposal that would require the utility to track and account for net salvage amounts received in rates separately from other components of depreciation expense. The Commission finds such an additional requirement would be reasonable to protect the ratepayers.

Summary

In view of this evidence, the Commission finds that Laclede has shown the accrual method to be just and reasonable and that Staff has failed to show that the Commission should adopt Staff's method of accounting for net salvage. The Commission wants to ensure that the method for tracking these expenditures and collections is clear and that the ratepayers do not overpay for net salvage costs. Therefore, the Commission will require a separate accounting for the net salvage in the depreciation reserve.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction:

Laclede Gas Company is a public utility engaged in the provision of natural gas service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission under Chapters 386 and 393, RSMo 2000. The Commission also has the authority to prohibit implementation of gas service rates that are unjust or unreasonable rates.⁴⁵

Burden of Proof:

The burden of proof to show that a proposed tariff is just and reasonable is upon the utility.⁴⁶ Orders of the Commission must be based on substantial and competent evidence, taken on the record as a whole, and must be reasonable and not arbitrary, capricious, or contrary to law.⁴⁷ Based upon its findings of fact, the Commission concludes that Laclede has met its burden of showing that its method of calculating net salvage depreciation value is just and reasonable. The Commission further finds that its Staff did not clearly articulate any convincing reason to deviate from this method of accounting. The Commission concludes that Laclede Gas Company's depreciation calculation for net salvage value should be made in accordance with Laclede's depreciation method. Therefore, Laclede shall make

⁴³ Exh. 150; p. 3 of Staff's Memorandum, Condition 6; Exh. 147, p. 114; Exh. 157, pp. 92-93; Tr. 1854-55, 1872-75.

⁴⁴ Exh. 157, pp. 71-72.

⁴⁵ Section 393.130, RSMo 2000.

⁴⁶ Section 393.150.2, RSMo 2000.

⁴⁷ Section 536.140, RSMo 2000.

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the necessary adjustments to its depreciation reserve to account for the accrual method.

Mootness:

A case is moot when a tribunal's decision would not have any practical effect upon any live controversy.⁴⁸ Where an event occurs that makes granting effectual relief impossible, the case is moot and generally should be dismissed.⁴⁹ This rule applies to contested cases before administrative agencies just as it applies to courts. With respect to utility matters, the general rule is that "issues under old, superseded tariffs are moot and therefore not subject to consideration."⁵⁰

The sole issue in this case is whether Staff's or Laclede's method for setting the net salvage value of Laclede's assets for the purpose of ratemaking should be accepted. Originally, the Commission determined that Staff's method of calculation was appropriate. Laclede and AmerenUE appealed this decision.

As noted, new tariffs setting rates became effective on December 1, 2001, and November 9, 2002. Those tariffs provided for rate increases, thus affording prospective relief to Laclede. As Laclede concedes, there is no lawful possibility of any additional moneys to be paid by Laclede's ratepayers under the tariffs in effect from December 27, 1999, to December 1, 2001, just as there would be no lawful way to refund moneys overpaid by Laclede's ratepayers.⁵¹ The revenue produced by the effective rates was paid directly to Laclede, unconditionally, pursuant to tariffs approved by the Commission. This revenue became the property of Laclede and no part of it can lawfully be refunded or returned to the ratepayers, nor can additional rates now be collected.

Laclede and AmerenUE argue, and Staff agrees,⁵² that the Commission could order different net salvage depreciation rates for the time period in which those rates were in effect. This would allow Laclede to adjust those depreciation reserves upward and adjust its income downward for that period. Thus, Laclede's depreciation reserve accounts would be increased for future ratemaking periods and some practical relief could be awarded to Laclede.

Accounting Adjustments:

Because this case has been in an appeal status for over five years, to alter the depreciation rates by simply adjusting the depreciation rates would effectively hurt Laclede financially. This is because Laclede would have to show decreased net income for the period as a result of increased depreciation expenses. Laclede requests that the Commission require it to make the immediate change in its depreciation rates but to "also order that Laclede make a corresponding accounting adjustment to decrease the amount that Laclede currently books to net salvage

⁴⁸ *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001).

⁴⁹ *Id.*; and see *Armstrong v. Elmore*, 990 S.W.2d 62, 64 (Mo. App., W.D. 1999).

⁵⁰ *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. App., W.D. 1981).

⁵¹ *State ex re. Utility Consumers' Council of Missouri v. Public Service Commission*, 585 S.W.2d 41.

⁵² *Staff's Brief on Mootness*, filed August 18, 2004, p. 2.

expense.”⁵³ Laclede makes this suggestion to keep from booking the net salvage expense twice, once to depreciation expense and once to net salvage expense, thus decreasing Laclede's net income.

The Commission has previously found that the net salvage expense is valued at \$2.3 million annually.⁵⁴ The Commission determines that Laclede shall increase its depreciation rates to generate an amount of additional depreciation expense equal to \$2.3 million annually, with a corresponding credit to the depreciation reserve account. The Commission also determines that in order to make this return to the accrual accounting method after the company has been booking rates following Staff's expense method while this case was on appeal, it is just and reasonable to require Laclede to reduce its net salvage expense by an amount equal to the additional depreciation expense generated by the increases in depreciation rates and a corresponding debit to the depreciation reserve account.

The Commission also concludes that in order to ensure the accurate tracking of net salvage accounts, Laclede shall keep a separate accounting of the amounts accrued for recovery of its initial investment in plant from the amounts accrued for the cost of removal, as recommended by Staff.

IT IS THEREFORE ORDERED:

1. That Staff of the Missouri Public Service Commission and the Office of the Public Counsel's motion to file replies to Laclede and AmerenUE's briefs are granted.
2. That Laclede Gas Company is granted leave to file its December 9, 2004 pleading and the motions to strike that pleading are denied.
3. That the Report and Order issued on December 14, 1999, and the Second Report and Order issued on June 28, 2001, are readopted by the Commission except as modified by the additional findings of fact and conclusions of law set out in this Third Report and Order.
4. That the calculation of net salvage value for the determination of depreciation rates shall be done in accordance with Laclede Gas Company's recommendations.
5. That Laclede Gas Company shall increase its depreciation rates and booked depreciation expense by \$2.3 million annually, with a corresponding credit to the depreciation reserve accounts, and a decrease to its net salvage expenses by an amount equal to the additional depreciation expense generated by the increases in the depreciation rates, with a corresponding debit to the depreciation reserve.
6. That Laclede Gas Company shall keep a separate accounting of its amounts accrued for recovery of its initial investment in plant from the amounts accrued for the cost of removal.
7. That this Third Report and Order shall become effective on January 21, 2005.
Davis, Ch., Murray and Appling, CC., concur;
Clayton, C., dissents, with an opinion to follow;
Gaw, C., dissents with a dissenting opinion to follow.
and certify compliance with Section 536.080, RSMo

⁵³ *Request Regarding Accounting Adjustment to Implement Depreciation Rates*, (filed December 9, 2004), para. 3.

⁵⁴ Ex. 23, page 7; Tr. 1279-80.

Opinion of Commissioner Robert M. Clayton III

This Commissioner respectfully concurs in part and dissents in part from the majority opinion in this matter. Although this Commissioner generally agrees that the accrual method as proposed by Laclede and AmerenUE should have been utilized in the underlying rate case in deciding the issue of mass account net salvage recovery, there is no real relief that can be afforded the utility and the matter is, therefore, moot. Because this decision will have no practical effect upon any live controversy, any Report and Order by this Commission would constitute little more than a declaratory ruling or general statement of policy, which, despite this Commissioner's wishes, is not authorized by Missouri law. In addition, some clarification of the issues discussed in the Report and Order is appropriate, especially in regard to burden of proof and the need for further study and review of the issue.

This remand relates to the issue of depreciation and how best to account for a component known as net salvage value of mass account plant, or the estimated cost of removal of mass account plant less any amount recovered in selling the removed materials.¹ There are two competing proposals for how best to account for this issue. Staff has recommended using a "Cash" or "Expense" method of accounting for this component of depreciation. Laclede has suggested the use of an accrual method of accounting and has made reference to this method as the "Traditional" or "Standard" method. This Commissioner finds the use of such language argumentative and conclusory and a more thorough analysis of the issue's history is required.

Depreciation is the loss in value incurred by consumption or prospective retirement of plant in the course of service from such known causes as wear and tear, obsolescence and decay.² "Depreciation accrual rates are used to match all revenues earned during a given time period with all the expenses incurred during that same time period to produce those revenues. In each year of service customers are charged with the portion of the asset that it or they consume or use."³ "Net salvage value" means the salvage value of property retired less the cost of removal.⁴ If the salvage value of the retired property is greater than the cost of removing and disposing of the property, then the net salvage value is a positive number. That value is recognized in rates and reduces the depreciation recovery during the plant's life. If the salvage value of the property is less than the cost of removing and disposing of the property, then the net salvage value is a negative number, and that net cost is referred to as "negative net salvage."⁵ The question

¹ *State of Missouri ex. rel. Laclede Gas Company and Union Electric Company d/b/a AmerenUE v. Public Service Commission of the State of Missouri*, Missouri Court of Appeals, Western District, Case No. WD61486, March 4, 2003. This matter dealt with the net salvage value of mass accounts. Life span accounts were not at issue.

² See *Public Utility Depreciation Practices*, National Association of Regulatory Utility Commissioners, August 1996, p.318.

³ See generally, *Depreciation Systems*, Frank K. Wolf and W. Chester Fitch, 1994, pp.4-6.

⁴ 18 CFR Part 101 (36) Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Federal Power Act.

⁵ Wolf and Fitch, *supra* note 3, at 7- 8.

presented in this matter is whether an anticipated negative net salvage value should be included in the depreciation rates so that such cost is recovered in rates over the service life, or whether it should be recovered only if and when it actually occurs.⁶

In the early days of utility regulatory accounting, net salvage was not considered a significant issue because, 1) the plant in service was a fraction of the value of plant in service today, 2) there was little thought of removing plant because the industry was brand new, and 3) the plant in service actually had a positive net salvage value rather than a negative net salvage value. At least until the 1950s, depreciation rates were simply a flat percentage applied to plant in service; in the 1960s, depreciation rates by account were established for Laclede.⁷ As late as the mid-1990s, state regulatory commissions addressed the issue of net salvage in a variety of ways, including both the accrual and expense methods described above and some combining parts of both.⁸ As Ms. Schad discusses, in 1960, Laclede's depreciation accrual rate was increased due to increased net salvage costs.⁹ Subsequent to the late 1970's, Laclede's rate cases, including the depreciation rates, settled pursuant to Stipulation and Agreement. There is no way to know whether or to what extent Laclede's depreciation rates reflected positive or negative net salvage value.¹⁰ Since various methods of depreciation calculation have been used over the years, the terms "Traditional" or "Standard" should not be used.

As the projected costs associated with negative net salvage continued to grow, a fairness issue arose. As discussed above, the reason for setting depreciation rates is to recover the cost of the use of plant over the time it is in service. If a large portion of those costs comes from retiring plant, then customers that use it should contribute to the cost of removing it. Each party addresses the question of "intergenerational equity" arguing that their own proposed depreciation treatment more closely assigns the costs of plant to those customers who benefit from it.¹¹

The Staff became concerned that current customers were paying more in rates than should be reasonably attributed to them. Unsatisfied that using past retire-

⁶ As noted above, this matter does not pertain to "Life Span" accounts, but only with "mass accounts." A life span account relates to the final retirement of a major structure. Mass accounts are accounts "consisting of large numbers of similar units, the life of any one of which is not, in general dependent upon the life of any of the other units. For such classes of plant, the retirement of a group of units occurs gradually until the last unit is retired. The retirements and additions to the account occur more or less continually and systematically." NARUC, *supra* note 2, at 321-322.

⁷ Supplemental Rebuttal Testimony of Staff Witness Rosella L. Schad, p. 4.

⁸ Schad, *id.* at 7.

⁹ Schad, *id.* at 17.

¹⁰ Schad, *id.* at 5.

¹¹ Schad, *id.* at 11-15; Supplemental Direct Testimony of Laclede Witness William E. Stout, at pp. 12-17. This principle of "intergenerational equity" is also called a "matching principle." According to Wolf and Fitch, *supra* note 3, at 7-8, "[t]he matching principle specifies that all costs incurred to produce a service should be matched against the revenue produced. Estimated future costs of retiring of an asset currently in service must be accrued and allocated as part of the current expenses. *** The accounting treatment of these future costs is clear. They are part of the current cost of using the asset and must be matched against revenue."

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ments as a guide to future needs or simply estimating future costs or averaging the two could yield a reliable result, in the early 1990s, the Staff began advocating its current position that net salvage value should be expensed, rather than accrued.¹² Staff felt that if the company were not incurring retirement costs commensurate with the amounts it was recovering in rates, it would receive a windfall of extra revenue.¹³ Further, at some point the company would likely incur the costs of removing plant but the funds could have been spent already and no longer available as the collections would have occurred years before.¹⁴ On the other hand, AmerenUE and Laclede assert that the accrual method, while not perfect, addresses the issue better, because current customers are paying for the full costs of plant that might cost more to take out of service than it cost to put into service.¹⁵

The record indicates that the accrual method has been used in Missouri since the early 1960's, and continues to be used by the vast majority of state regulatory commissions today. The exceptions to the rule include the sovereign states of New Jersey and Pennsylvania, which are required by applicable state law to use the expense method, and Georgia.¹⁶ Some commissions, such as Delaware and Arkansas, experimented with the expense method and later returned to the accrual method. Other states have approved the use of the expense method when the parties stipulate to it in a larger comprehensive settlement, a category in which Missouri falls. Suffice it to say, however, that the accrual method is far more widely used, and had been used almost exclusively in Missouri in contested cases until the present dispute.¹⁷

As noted above, Staff's position is that the accrual method cannot accurately estimate the costs, conditions or timing of removal. Plant may remain in service longer than originally anticipated or may not be removed at all. As technology and environmental concerns change, the estimated cost of removal may change. Staff asserts that estimating the future cost of a future event that may or may not take place is vague at best, and cannot reach the standard of "known and measurable."¹⁸

In cases before the Commission in which a rate increase is sought, the company seeking the rate increase bears the burden of proof.¹⁹ Commission policy or procedure must be promulgated in a rule,²⁰ and *stare decisis* does not apply to

¹² Schad, *supra* at Schedule 8-4.

¹³ See the Direct, Rebuttal and Surrebuttal Testimony of Staff Witness Paul W. Adam, adopted by Staff Witness Rosella L. Schad, in which Mr. Adam discusses the inaccurate projections to remove the "Gas Holders" from service by 2006.

¹⁴ Schad, *supra* at 15-18, Schedule 8-8 – 8-11.

¹⁵ Supplemental Direct Testimony of Ameren UE Witness Martin J. Lyons, p.8.

¹⁶ Tr. at 2009.

¹⁷ Schad, *supra* at Schedule 8.

¹⁸ Schad, *supra* at 12 and 13.

¹⁹ §393.150, RSMo. 2000.

²⁰ See §536.010(4), RSMo. 2000.

Commission decisions,²¹ no matter how often or consistently a Commission decision is made.

Each rate case stands on its own and is decided by its respective Commission. Laclede established that the accrual method has a significant history in this state and is relied upon frequently, if not exclusively, by the vast majority of state Commissions. The utility showed that the accrual method is a reasonable method, relied on in Missouri in past cases, which yields reasonably reliable information on which to establish "just and reasonable" rates. This method purports to have safeguards to protect the interests of ratepayers and maintain a minimum level of accuracy. This Commissioner believes that Laclede made a *prima facie* showing that this method is one method that would lead to "just and reasonable" rates.

This Commissioner believes that it is up to the Staff to rebut or refute that *prima facie* showing. It is up to the Staff to show that the accrual method is no longer suitable or, at the very least, is vastly inferior to the expense method or any other method, with specific evidence and proof. Although the Staff did establish that the accrual method does have certain inherent imperfections, it never satisfactorily established that the expense method was so superior to the accrual method that a change in accounting practices and departure from the Uniform System of Accounts was warranted. It was the inability to articulate a sufficient reason for the departure from an established norm that caused this case to be remanded on two different occasions by the Court.²²

Staff argued in its brief that, "There is no evidence in this record that the formula accurately predicts actual cost of removal." Staff further argues that there is no empirical study to prove the accuracy of the accrual method.²³ In turn, Staff does not offer any studies or specific evidence that the method is not an accurate method of determining the proper amount to be included in the depreciation schedule. Rather than demand the company to show a study that the method is accurate, Staff should produce a study proving the inaccuracy of the method or provide evidence of specific failures that have occurred in Missouri or elsewhere because of the method's use.

Notwithstanding the conclusion reached in this Opinion, this Commissioner is mindful of the concerns that have been raised about the accrual method. The accrual method may not completely address questions of intergenerational equity,

²¹ *State ex. rel. GTE North, Inc. v. Mo. Pub. Serv. Comm'n*, 835 SW2d 356,371 (MoApp 1992); *Cent. Hardware Co., Inc. v. Dir. Of Revenue*, 887 SW2d 593,596 (Mo. banc 1994); *State ex. rel. AG Processing, Inc. v. Mo. Pub. Serv. Comm'n*, 120 SW3d 356,371 (Mo. banc 2003) 356,371 (MoApp 1992).

²² The Court stated: The Commission's findings of fact also imply that the Staff's depreciation method of calculating net salvage is less likely to result in Laclede overrecovering from its customers than Laclede's depreciation method. The Commission's findings of fact fail, however, to support such a contention. No evidence or facts of any nature are cited by the Commission to support this conclusion. *** Similarly, the Commission's findings of fact stating that the Staff's depreciation method is less likely to result in overrecovery from Laclede's customers are conclusory for failing to provide any support of this finding." Note 1, *supra* at 5.

²³ Staff Brief at p.4.

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a point the utilities make throughout the case. There are valid concerns about mass account plant not being retired as anticipated or plant costing less to remove than was accrued in the depreciation reserve. In addition, the accrual method will always accrue a greater amount in the depreciation reserve than what is spent to retire plant, and ratepayers will never be made completely whole. Because of the pooling of assets for depreciation purposes, the customer can only be made whole when there is no more growth in the system and all assets are fully depreciated. These concerns should be evaluated and considered in future cases.

This Commissioner concurs with the majority in this case that the appropriate method of accounting for mass account net salvage is the accrual method. This method is used around the country and conforms to the Uniform System of Accounts. A departure from it could profoundly affect the utility; such a change should not be made lightly. The increased cash flow generated by the accrual method is of a great benefit to the utility. It enables it to invest in new plant and keep existing plant in good repair. While the Commission strives to keep rates low for energy consumers, it has an obligation to the industry it regulates to see that operations are sufficiently funded to provide safe and adequate service and to allow an opportunity for a reasonable return on investment. This method also properly assigns a share of cost to ratepayers who benefit from the plant.

This Commissioner believes further study and discussion are necessary among the Office of the Public Counsel, the Staff, the regulated utilities in this state and their customers. The parties in the matter have raised valid concerns about the shortcomings of both methods and further work may result in changes that ameliorate those shortcomings. As the net salvage value component continues to grow, the issue will only continue to increase in importance. A generic docket or rulemaking discussion would provide an additional forum for discussion in arriving at a method that will satisfy the concerns of the parties and the Commission.

This Commissioner believes that it is imperative to follow Staff's recommendation that a separate accounting be made by the utility of the accrued depreciation for net salvage. Staff asserts that, "[I]f allowances recorded in the depreciation reserve attributable to cost of removal accruals are separately identified, regulatory analysis and more accurate rates will be easier."²⁴ There was extensive testimony about the various "safeguards" in place to protect current and future ratepayers under the accrual method, but those need to be reviewed and adjusted regularly so that intergenerational equity and accuracy of recovery is maintained.²⁵ Staff continued in its argument that, "[a]bsent such information, it would be difficult at best to effectuate any customer safeguards against overcharges for cost of removal."²⁶ Lastly, this Commissioner also believes that the analysis must include a regularly scheduled comparison and historical tracking of the accrued amounts for removal costs versus the actual amounts spent on removing plant. Since the customer is advancing the funds for future estimated expenses, it is critical to monitor the actual

²⁴ Staff Brief at p. 10.

²⁵ Lyons, *supra* at 10-19.

²⁶ Staff Brief at p. 10.

plant retirement costs to verify that annual accruals do not deviate on an increasing basis over time from the actual retirement expenditures.

However, contrary to the different accounting treatment and tracking mechanism suggested above, the suggestion that these funds be separated from general funds of the company would be counter-productive and that proposal is not well taken.

The Commission majority believes that resolving this question will make an impact and a decision is necessary in the case. Despite my agreement about the use of the accrual method, I believe the entire matter is moot. No rate can or will be changed as a result of the Report and Order. The outcome of no future rate proceeding or tariff filing will be predetermined as a result of the Report and Order nor will the decision have binding effect.

I agree with the majority that “[a] case is moot when a tribunal’s decision would not have any practical effect upon any live controversy.”²⁷ Further, I agree that “[w]ith respect to utility matters, the general rule is that ‘issues under old, superseded tariffs are moot and therefore not subject to consideration.’”²⁸ However, there are limited exceptions to the mootness doctrine, and “a court has discretion to review a moot case where the case presents a recurring unsettled legal issue of public interest and importance that will escape review unless the court exercises its discretionary jurisdiction.”²⁹ I believe this exception applies only to judicial review and does not apply to this Commission, as the Commission has no authority to issue a policy statement that can bind itself or future Commissions, and therefore cannot “settle” an unsettled area of the law.

In conclusion, this Commissioner argues that this matter is moot and should be dismissed as such. It is for this reason that this Commissioner cannot support the majority’s Report and Order.

²⁷ *Third Report and Order*, Missouri Public Service Commission, Case No. GR-99-315, Issued January 11, 2005, at 17.

²⁸ *Id.* at 18.

²⁹ *State ex. Rel. Jackson County v. Missouri Public Service Commission*, 985 SW2d 400 (MoApp WD 1999).

Dissenting Opinion of Commissioner Steve Gaw

I respectfully dissent from the Third Report and Order issued by the majority in the above captioned proceeding. As the majority opinion notes, “a case is moot when a tribunal’s decision would not have any practical effect upon any live controversy.”¹ The Report and Order continues on to note, “[w]ith respect to utility matters, the general rule is that ‘issues under old, superseded tariffs are moot and therefore not subject to consideration.’”² Despite its explicit recognition that rates resulting from this proceeding have been replaced by those set in two subsequent proceedings³, the majority fails to adequately explain how its decision will have any “practical effect upon any live controversy.”

In its Report and Order, the majority briefly discuss the concept of mootness.⁴ Despite the repeated claims of mootness, the Commission properly recognized that its finding could have a practical, albeit negative, effect on Laclede and thereby could avoid the strict dictates of such a finding. Specifically, the Commission noted that:

the Commission could order different net salvage depreciation rates for the time period in which those rates were in effect. This would allow Laclede to adjust those depreciation reserves upward and adjust its income downward for that period. Thus, Laclede’s depreciation reserve accounts would be increased for future ratemaking periods and some practical relief could be awarded to Laclede.⁵

When asked directly whether Laclede truly sought such “practical relief”, counsel appeared to waiver. In light of the punitive effect that this adjustment would have on Laclede’s past earnings as well as the corresponding reduction to rate base to be used in future proceedings, I specifically asked Laclede counsel whether it would prefer to have the Commission make a mootness finding or to have the Commission issue the suggested practical relief.⁶ Given the “rock and a hard place” implication of this question, Laclede’s counsel adeptly avoided the question.⁷

In spite of the possible practical relief acknowledged by the majority in its Report and Order, the majority instead opted for accounting manipulations designed solely to attempt to avoid the mootness doctrine while simultaneously alleviating any negative financial implications on Laclede. Specifically, the majority orders a \$2.3 million increase in depreciation rates designed to reflect the

¹ Report and Order at page 18, citing to *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001).

² *Id.* citing to *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo.App. 1981).

³ *Id.* at pp. 6-7.

⁴ *Id.* at pp. 18-19.

⁵ *Id.* at 19.

⁶ Tr. at 1316.

⁷ Tr. at 1319.

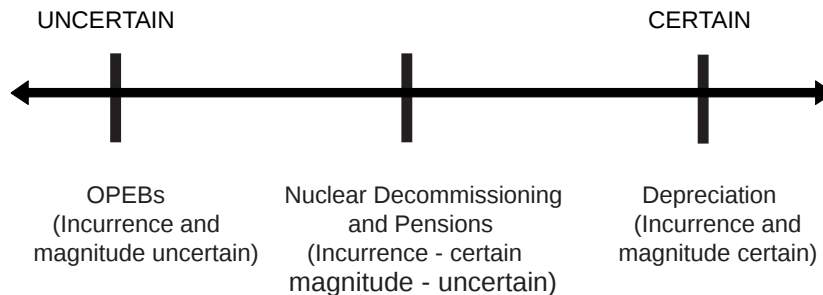
utilization of the accrual method for treating negative net salvage. In addition, the majority ordered a corresponding \$2.3 million debit to depreciation reserve. The accounting manipulations have no practical effect in that the adjustments do not change revenues, expenses, net income, plant-in-service, depreciation reserve or rate base. In addition, the adjustments do not, and of course, should not result in any change to retail rates.⁸ Given the lack of “practical relief” granted by the majority, I find that this matter should be deemed moot.

Aside from the bar provided by the mootness doctrine, I harbor reservations regarding the appropriateness of the accrual method of recovering for net salvage. Specifically, I am concerned about the use of estimates to recover costs that are uncertain and that may never actually be incurred. In its testimony, Laclede and AmerenUE note that the Commission routinely uses estimates. In fact, the companies note that the use of estimates is implicit in the calculation of depreciation rates. The difference, however, is that the depreciation rate determination uses estimates to provide for the return of costs that: (1) have already been incurred and (2) are of a certain magnitude. Any lack of accuracy in the estimates used for the calculation of depreciation rates (i.e., average service life) is not further compounded by a concern regarding the magnitude of the cost to be recovered or whether the cost will ever actually be incurred.

In addition to the use of estimates for determining depreciation expense, the companies also direct the Commission’s attention to the use of estimates in calculating pensions and nuclear decommissioning. In reality, cost of removal is an advance by ratepayers for an expense which is of an uncertain future magnitude. It is therefore, more like these examples than costs incurred and recovered through depreciation. Nevertheless, while these examples are a better analogy than depreciation, the companies’ comparison is again not entirely accurate. Although the actual incurrence of the expense is certain, the ultimate magnitude of the expense is not. In each of these situations, a legally enforceable obligation has been created by statute which mandates the eventual payment of these costs. Thus, while the Commission may have concerns regarding the use of estimates for determining the magnitude of such costs, it is assured that such expenditures will ultimately be incurred.

In reality, along the spectrum of expense certainty, the recovery for cost of removal is most like the recovery of OPEBs (retirement benefits other than pensions); it is an advance by ratepayers for an uncertain future expenditure of a questionable magnitude.

⁸ The Company is undoubtedly aware that it is prohibited, under the bar against retroactive ratemaking, from seeking rate increases to reflect accrual treatment of net salvage for the period in which the rates arising out of this case were in effect.



In the early 1990s, the Commission was confronted with numerous requests to adopt accrual accounting for post-retirement benefits other than pensions. Similar to the situation at hand, the utilities repeatedly noted that: (1) accrual treatment was consistent with GAAP as well as recent Financial Accounting Standards Board pronouncements; (2) the vast majority of other Commissions had adopted accrual treatment; (3) utilization of cash accounting would result in reduced cash flow and (4) disparate treatment by the Missouri Commission would hamper these utilities in accessing the capital markets.

Despite these arguments the Commission repeatedly refused to adopt accrual accounting for OPEBs. Instead, in response to arguments about the uncertainty of the incurrence of such costs, the Commission continued to use the cash method for recovering these expenses.⁹

Given the Commission's persistent refusal to grant recovery of OPEB expenses that are of uncertain magnitude and that may not actually be incurred, the utilities eventually sought redress in the General Assembly. While the legislature mandated the use of accrual accounting for OPEBs, it also sought to prevent a situation where the utility realized a windfall as a result of never actually incurring the expense. Therefore, similar to the funding requirements for pensions and nuclear decommissioning, the legislature required all monies collected to be placed in an external fund and used only for retiree benefits.¹⁰ In fact, the legislature

⁹ See, *In re St. Joseph Light & Power Company*, 2 Mo.P.S.C.3d 248 (1993); *In re United Telephone Company of Missouri*, 2 Mo.P.S.C.3d 403 (1993); *In re Missouri-American Water Company*, 2 Mo.P.S.C.3d 446 (1993); *In re Southwestern Bell Telephone Company*, 2 Mo.P.S.C.3d 479 (1993).

¹⁰ See, Section 393.292 regarding the recovery and funding of nuclear decommissioning costs; Section 386.315 regarding the recovery and funding of OPEB costs; and federal ERISA laws regarding the recovery and funding of pension expense. Noticeably, the legislature also deemed it appropriate for the creation of a special fund for the safe keeping of amounts collected through depreciation expense. Section 393.240.2 specifically requires each utility to "set aside the moneys so provided for out of earnings and carry the same in a depreciation fund and expend such fund only for such purposes and under such rules and regulations, both as to original expenditure and subsequent replacement, as the commission may prescribe. (emphasis added). The rationale behind the utilities' and Commission's evolution away from such "depreciation funds" is unclear.

noted that "in no event shall any funds remaining in such funding mechanism revert to the utility."¹¹

It is not my intention to predetermine, through this dissent, any decision on my part regarding the appropriate methodology for calculating and recovering net salvage costs. I understand that the accrual method benefits the cash flow of the Company. Here, the Company proposes that ratepayers be required to advance money for removal of assets. The Commission must balance the benefits and risks to the consumer of making the consumer pay such advances. If the accrual method does not adequately provide that balance, other avenues should be utilized that will. This may include using the expense method or following the legislature's lead in requiring that the net salvage be segregated and held in trust. Ratepayer money should be advanced to the Company for possible future expenditures only after the Commission has weighed the accuracy of the estimate of the expenditures, the likelihood of the incurrence of the expenditure and the financial stability and reliability of the Company.

¹¹ Section 386.315.2 RSMo.

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**In the Matter of an Investigation of the Fiscal and Operational
Reliability of Cass County Telephone Company and New
Florence Telephone Company, and Related Matters of Illegal
Activity.***

*Case No. TO-2005-0237
Decided January 14, 2005*

Rates §23. The Commission established this uncontested case directing the Staff of the Commission to investigate all matters pertaining to the financial and operational reliability of Cass County Telephone Company and New Florence Telephone Company. The investigation stemmed from a Federal indictment alleging a shareholder and officer were involved in a telephone cramming scheme involving the companies.

Telecommunications §33. The Commission established this uncontested case directing the Staff of the Commission to investigate all matters pertaining to the financial and operational reliability of Cass County Telephone Company and New Florence Telephone Company. The investigation stemmed from a Federal indictment alleging a shareholder and officer were involved in a telephone cramming scheme involving the companies. Staff was also directed to investigate the unauthorized charges on the customers bills and the receipt and disbursement of the Universal Service Funds.

ORDER ESTABLISHING INVESTIGATION CASE

SYNOPSIS:

This order establishes a case within which the Staff of the Public Service Commission is directed to investigate all matters pertaining to the operations of two Missouri telecommunications utilities, Cass County Telephone Company ("Cass County") and New Florence Telephone Company ("New Florence"). These two utilities are either owned in part or operated by Ken Matzdorff who has recently plead, or is reportedly about to plead, guilty to certain felony fraud charges based primarily on charges of telephone cramming. As a result of this order, Staff is directed to investigate the continuing fiscal and operational reliability of telecommunications service for the customers of these companies.

FACTS:

1. On February 5, 2004, a docket was established to receive a Stipulation regarding the earnings of Cass County Telephone Company. Subsequent to the filing of the Stipulation, the Commission became aware of a federal indictment alleging that certain entities associated with Cass County shareholder and officer, Ken Matzdorff, had been involved in a telecom cramming scheme. As a result of Commissioner concerns arising out of the indictment, an on-the-record presentation was conducted on April 19 at which Mr. Matzdorff appeared and testified. Ultimately, while it determined that the Stipulation should be allowed to go into effect, the Commission also expressed ongoing concerns regarding the allegations surrounding the Company and other companies associated with Mr. Matzdorff.

* See page 565 for another order in this case.

As a result, the Commission noted its intentions to continue to monitor the developments regarding the allegations contained in the indictment.

2. On or about July 27, 2004, a federal arrest warrant was issued for Mr. Matzdorff. The affidavit underlying the warrant stated that Mr. Matzdorff "played an integral role, as an associate of the Gambino crime family" in a telephone cramming scheme, as well as an effort to launder the proceeds of both that scheme as well as a separate internet pornography scheme. Specifically, the affidavit indicated that Mr. Matzdorff was instrumental in establishing and operating USP&C, which was the primary vehicle used to place unauthorized charges on customer telephone bills (the cramming scheme). Furthermore, the affidavit indicates that Mr. Matzdorff was instrumental in the operation of LEC L.L.C., which was used as a vehicle for the laundering of proceeds realized as a result of the cramming scheme as well as proceeds realized as a result of the internet pornography scheme. LEC L.L.C. is the principal owner of Cass County Telephone. Finally, the affidavit indicates that Cass County overpaid for certain services provided by a company called Overland Data. The affidavit further stated that the practical effect of this overpayment was to defraud the federal Universal Service Fund ("USF") and that these defrauded funds were ultimately laundered by the parent company, LEC L.L.C. and were distributed to Gambino associates.

3. On July 29, 2004, based upon the information contained within the Matzdorff arrest warrant, the Commission authorized its Staff to conduct an investigation surrounding the allegations contained in the arrest warrant. Specifically, the Commission sought information regarding whether Missouri customers or their rates would be affected by the allegations contained in the arrest warrant.

4. On September 30, 2004, the Commission, primarily as result of concerns regarding the allegations contained in the Matzdorff arrest warrant, declined to certify Cass County and New Florence for receipt of high-cost service support from the federal USF. Shortly thereafter, the Federal Communications Commission directed the Universal Service Administrative Company to immediately suspend monthly USF support payments to Cass County and New Florence.

5. Although the charges against Mr. Matzdorff had been temporarily withdrawn, newspaper articles indicate that Mr. Matzdorff has recently plead guilty in Brooklyn federal court to one count of conspiracy to commit wire fraud and one count of conspiracy to launder money. Moreover, subsequent media articles have indicated that Mr. Matzdorff intends to plead guilty in Kansas City federal court to another charge of defrauding the federal USF.

6. Furthermore, the United States government has given notice of its intent to seek criminal forfeiture of certain of Mr. Matzdorff's assets in accordance with Title 18, United States Code, Section 981 (a)(1)(C) and Title 28, United States Code, Section 2461(c). Inasmuch as this forfeiture could reach to operating capital or plant used by telecommunications companies in Missouri, any potential forfeiture concerns the Commission.

7. As a result of the investigation authorized on July 29, 2004, Staff was anticipating that it would file its Report in the immediate future. Staff and the Commission have concerns, however, that certain information requested from LEC L.L.C. and other affiliated companies may not be forthcoming. Therefore, the Commission deems it appropriate to create a docket for the formal establishment of this investigation as well as the receipt of any Staff discovery problems, for the

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issuance of any necessary discovery orders, and in order to take additional actions found necessary to protect the customers of the telephone companies affected by these events aforesaid.

LEGAL AUTHORITY TO INTERVENE:

Based upon the Commission's general investigatory power specified in Sections 386.320, 386.330 and 392.250, in addition to specific authority over telecommunications companies found throughout Chapter 392 and set out *infra*, the Staff of the Commission is hereby directed to investigate all matters pertaining to operations of the companies, including assessment of the continuing fiscal and operational reliability of telecommunications service for the customers of Cass County and New Florence.¹ This investigation includes extensive on-site review and inspections² and may include the need for a change of management and control of the companies by legal means.

Staff is hereby directed to complete a financial review concerning the receipt and disbursement of Universal Service Funds. Missouri statutes provide that:

Any person who shall willfully make any false entry in the accounts, books of account, records or memoranda kept by any corporation, person or public utility governed by the provisions of this chapter, . . . or who shall willfully neglect or fail to make full, true and correct entries . . . of all facts and transactions appertaining to the business of such corporations, . . . or who shall falsely make any statement required to be made to the public service commission, . . . shall be deemed guilty of a felony, and upon conviction shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment for not less than two years nor more than five years, or by both such fine and imprisonment.³

¹ The commission shall have the general supervision of all telegraph corporations or telephone corporations, and telegraph and telephone lines, as herein defined, and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated are managed, conducted and operated, not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all the provisions of law, orders and decisions of the commission and charter and franchise requirements. Section 386.320.1 RSMo 2000.

The commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any telecommunications company subject to its supervision, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation in violation of any provision of law or in violation of any order or decision of the commission. Section 386.330 RSMo 2000.

² The commission shall have power, either through its members or responsible engineers or inspectors or employees duly authorized by it, to enter in and upon and to inspect the property, equipment, building, plants, factories, powerhouses, offices, apparatus, machines, devices and lines of any of such corporations or persons. Section 386.320.2 RSMo 2000.

³ Section 386.560 RSMo 2000. Mishandling records - - false statements - - penalty - - order provisions

In addition, Section 386.570 provides that any person who violates any law, or who fails to obey any order is subject to a penalty of not less than \$100 nor more than \$2,000 for each offense. Every violation is a separate and distinct offense, and each day's continuance thereof shall be and be deemed to be a separate and distinct offense. Similarly, every officer or employee who aids or abets any violation is guilty of a misdemeanor and is punishable by a fine not exceeding \$1,000, or by imprisonment in a county jail not exceeding one year, or by both.⁴ Staff shall pursue evidence of any circumstances discovered during the course of its investigation.

Staff shall also review the conduct of the officers and employees of these companies to determine whether either company has suffered a financial loss, or other damage, as a result of illegal acts. Such a loss should include, but would not be limited to, the companies' loss of USF support. Any such loss, along with attorneys fees and punitive damages, should be recoverable by the company pursuant to Section 392.350.⁵ Circumstances which might support such an action shall be reported to the Commission and the company so affected. In addition, any telecommunications company officer or employee who violates certain provisions of Chapter 392 shall forfeit to the state a sum not to exceed \$5,000 for each day of a recurring offense and this, too, shall be investigated by Staff.⁶

Lastly, the Commission may impose any condition or conditions that it deems reasonable and necessary upon any company providing telecommunications service if such conditions are in the public interest and consistent with the provisions and purposes of this chapter.⁷ This same statutory section provides that the Commission may review any certificate of public convenience and necessity issued prior to September 28, 1987, and modify such certificate to impose any reasonable and necessary conditions authorized by this section. The certificates for these companies were both issued prior to that date.⁸

The primary concern of the Commission is the ongoing safe and reliable provision of telecommunications services to the citizens of Missouri. Staff's goal in this investigation should be to ensure the viability of those services. Furthermore, pursuant to the authority contained in Section 386.390, Staff shall be authorized to file complaints on any matters contained within the scope of this order and may further file such complaints or request the Commission authorize the filing of such complaints in this matter as it deems appropriate.

Given the scope of the investigation as set forth herein, the Commission has determined that this docket does not, at this time, meet the definition of a contested case as contained in Section 536.010. As such, the dictates of the Commission's

⁴ Section 386.580 RSMo 2000 Employee of public utility guilty of misdemeanor, when

⁵ Section 392.350 RSMo 2000. See also, *Overman v. Southwestern Bell Telephone Co.*, 675 S.W.2d 419 (Mo.App. 1984).

⁶ Section 386.360 RSMo 2000. Forfeiture - - penalties

⁷ Section 392.470 RSMo 2000 Conditions, commission may impose, when - - compensation to other companies, when, commission may order

⁸ Cass County Telephone was in existence prior to establishment of the Public Service Commission, on April 15, 1913, and is deemed to be certificated as of that date. New Florence Telephone received its certificate on June 28, 1960.

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ex parte rule are not applicable, and the Staff is directed to seek such additional clarification or authorization it deems appropriate to further the goals contained in this order.⁹ Furthermore, given the inapplicability of the *ex parte* rule, Staff is directed to meet with the Commission, either individually or in a properly noticed agenda session, for the purpose of bringing to light new events as they occur.

IT IS THEREFORE ORDERED:

1. That case TO-2005-xxxx be established for the purpose of the investigation of the financial and operational status of any certificated company in which Mr. Kenneth Matzdorff has any ownership interest or any operational control or influence resulting from his role as an officer or employee of such company.
2. That the Commission Staff shall undertake any discovery, audit, investigation, or other action it deems appropriate to investigate the financial and operational status of any certificated company in which Mr. Kenneth Matzdorff has any ownership interest or any operational control or influence resulting from his role as an officer or employee of such company.
3. That the Commission Staff shall investigate any matters pertaining to the Universal Service Fund and report any irregularities to the Commission.
4. That the Commission Staff shall file a status report on February 1, 2005, and every 30 days thereafter to inform the Commission of the status of its work herein.
5. That the Commission Staff is hereby authorized to file a complaint(s) on any matters contained within the scope of this order.
6. That this order shall become effective on January 28, 2005.

Roberts, Chief Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

⁹ To the extent that Staff seeks a resolution of a discovery matter or the issuance of subpoenas as discussed in paragraph 7, *supra*, those matters would involve a determination of legal rights and would be subject to the constraints of the *ex parte* rule.

In the Matter of the Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements: Consideration upon Remand from the United States District Court.*

*Case No. TO-2005-0037
Decided January 25, 2005*

Telecommunications §§ 45, 46. While denying a motion for rehearing, the Commission clarified its previous report and order to indicate that the Commission had made no finding about which provisions of the interconnection agreements would apply to determine the means by which the rates resulting from the report and order may be incorporated into those agreements.

**ORDER DENYING APPLICATION FOR REHEARING BUT CLARIFYING
THE COMMISSION'S REPORT AND ORDER**

On December 28, 2004, the Commission issued a Report and Order that directed Southwestern Bell Telephone, L.P. d/b/a SBC Missouri to determine new rates for unbundled network elements by rerunning its cost studies using a weighted average cost of capital determined using a capital structure that includes 70 percent equity and 30 percent debt, along with a 13 percent cost of equity and a 7.18 percent cost of debt. That Report and Order became effective on January 7, 2005. On January 6, SBC filed a timely Motion for Clarification and, in the Alternative, Application for Rehearing.

SBC challenges two aspects of the Report and Order. First, SBC contends that the Commission's determination that an appropriate capital structure for SBC should contain 70 percent equity and 30 percent debt is not supported by the evidence because none of the witnesses recommended those percentages. Second, SBC asks the Commission to clarify its Report and Order as it concerns the inclusion of the new rates that will result from this case in existing interconnection agreements.

NuVox Communications of Missouri, Inc.; XO Missouri, Inc.; Allegiance Telecom of Missouri, Inc.; MCI WorldCom Communications, Inc., MCImetro Access Transmission Services, LLC, AT&T Communications of the Southwest, Inc.; TCG St. Louis and TCG Kansas City; and Covad Communications Company; collectively referring to themselves as "the CLECs," filed a response opposing SBC's motion for rehearing or clarification. The CLECs argue that the Commission's determination of an appropriate capital structure is supported by the evidence and that there is no need for rehearing on that question. They also contend that the Commission's Report and Order correctly held that this case concerns the model M2A and not the specific interconnection agreements based on that model. Therefore, the CLECs contend that any changes to the rates established in those specific interconnection agreements must be made in compliance with the terms of those agreements.

Section 386.500.1, RSMo (2000), provides that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." In the judgment of the Commission, SBC has failed to establish sufficient

* See page 201 for another order in this case.

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reason to grant its application for rehearing. The Commission believes that its Report and Order sufficiently explained the basis for its determination of the appropriate capital structure to be used by SBC and finds that rehearing is not required on that question.

With regard to the question of whether the rates established in this case will be automatically incorporated in the interconnection agreements that incorporate the M2A, the Commission's Report and Order specifically mentioned "various change-of-law provisions" found in those contracts that could be used to incorporate the rates established in this case into those agreements.¹ SBC's motion for clarification points out that those interconnection agreements also contain provisions that might automatically incorporate the rates that result from this case without use of the specific "change-of-law" provisions.

As the Commission indicated in its Report and Order, it cannot adjudicate the rights of the parties to the various interconnection agreements in this case. In mentioning the "various change-of-law" provisions in its Report and Order, the Commission did not intend to make any finding about which provisions of the interconnection agreements would apply to determine the means by which the rates resulting from this case may be incorporated into those agreement. To that extent, the Commission's Report and Order is clarified.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone, L.P. d/b/a SBC Missouri's Application for Rehearing is denied.
2. That the Report and Order previously issued in this case is clarified as specified in the body of this order.
3. That this order shall become effective on January 25, 2005.

Gaw, Clayton and Appling, CC., concur
Davis, Ch., and Murray, C., dissent

Woodruff, Senior Regulatory Law Judge

¹ Report and Order, Page 14.

**BPS Telephone Company, et al., Complainants, vs. Voicestream
Wireless Corporation, Western Wireless Corp., and South-
western Bell Telephone Company, Respondents.**

*Case No. TC-2002-1077
Decided January 27, 2005*

Telecommunications § 29. SBC offers a transit service to wireless carriers. Wireless calls originated by customers of the CMRS providers are transported to local telephone company customers. SBC provides the transit service either according to its intrastate wireless interconnection tariff, or under an interconnection agreement with the originating CMRS carrier.

Telecommunications § 33. SBC delivers transit traffic over its common trunk groups. None of the Complainants can distinguish that traffic from other interexchange traffic SBC sends over the same trunk groups. Thus they are unable to block such traffic, even when the originating CMRS carrier refuses to pay for termination. The Commission finds that SBC delivered wireless originated traffic from T-Mobile and Western Wireless's subscribers to subscribers of each of the Complainants during the time at issue.

Telecommunications § 33. The "cell phone" user that originated a call paid either T-Mobile or Western Wireless for the service. T-Mobile or Western Wireless then paid SBC, and any other carrier involved in transiting the call, but did not pay any of the Complainants. Although each of the Complainants has demanded payment, Respondents refuse to pay.

Telecommunications § 34. Citing the Missouri Court of Appeals, the Commission found that rural carriers "have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements."

APPEARANCES

W.R. England, III, and Brian T. McCartney, Attorneys at Law, Brydon, Swearingen & England, P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for Complainants BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communication Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, KLM. Telephone Co., Lathrop Telephone Company, and Mark Twain Rural Telephone Company.

Paul Lane and Leo J. Bub, Attorneys at Law, Southwestern Bell Telephone Company, L.L.C., doing business as SBC Missouri, One SBC Center, Room 3520, St. Louis, Missouri 63101, for Respondent Southwestern Bell Telephone Company, L.L.C., doing business as SBC Missouri.

Mark P. Johnson, Attorney at Law, Sonnenschein, Nath & Rosenthal, L.L.P., 4520 Main Street, Suite 1100, Kansas City, Missouri, 64111, for Respondents T-Mobile USA, Inc., formerly known as VoiceStream Wireless, Inc., Western Wireless, Inc., and Aerial Communications, Inc.

Bruce H. Bates, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

This case has had a somewhat unusual procedural history. Complainants filed their complaint on May 15, 2002. After some delay occasioned by the possibility of mediation, Respondents filed their answers on July 16. The Commission adopted a procedural schedule on July 30 and the parties thereafter filed direct testimony on August 26 and rebuttal testimony on September 23. The parties filed a list of issues on October 2 and a stipulation of certain facts on October 10. However, on October 11, the Commission canceled the hearing and set a briefing schedule when Staff moved on behalf of all parties that the case be resolved on the prefiled testimony and briefs.

The parties filed initial briefs in December 2002 and reply briefs in January 2003 and the case was then submitted. However, on May 5, 2003, the Commission reopened the record, stating:

As requested by the parties, the Missouri Public Service Commission canceled the scheduled evidentiary hearing in this matter and undertook to determine the complaint on the basis of the parties' stipulation of facts, their prefiled testimony, and their briefs. The final briefs were filed in January, 2003. The Commission has reviewed the record as submitted by the parties and has determined that it cannot resolve this matter without certain additional evidence. Therefore, the Commission will reopen the record herein for the limited purpose of receiving this evidence.

The evidence in question concerns the proportion of the traffic at issue that is interMTA, wireless-originated traffic and the proportion that is intraMTA, wireless-originated traffic. In the event that the parties are unable to adduce this evidence in any other way, the Commission will require that they cooperate in the performance of a traffic study or studies. The Commission will convene a prehearing conference to hear from the parties how this necessary evidence can best be provided.

A period of negotiation then followed during which the parties attempted to reach a consensus position with respect to the traffic proportions. This effort culminated with the filing of a non-unanimous stipulation and agreement on July 11, 2003. Respondent SBC Missouri filed its timely objection to the non-unanimous stipulation and agreement on July 16.

A new procedural schedule was established on September 3. Thereafter, the parties filed Direct Testimony on September 10 and 11, Rebuttal Testimony on October 9, and Surrebuttal Testimony on October 24 and 27. The parties filed lists of witnesses and issues and statements of position on the issues on October 29.

The Commission convened an evidentiary hearing on November 6 and 7, 2003. The Commission heard testimony from four witnesses and received six exhibits, in addition to the exhibits received on October 11, 2002. All parties were represented at the evidentiary hearing.

Following the evidentiary hearing, the Commission declined to set a briefing schedule and instead heard closing arguments on December 8, 2003.

On January 13, 2005, Complainants moved to dismiss their claims against Southwestern Bell Telephone Company, now doing business as SBC Missouri.

Motion to Strike Prefiled Direct Testimony:

On October 4, 2002, Respondents T-Mobile and Western Wireless moved to strike certain evidence offered by Complainants as inadmissible hearsay. In Missouri, the "admission of an agent or employee . . . 'may be received in evidence against his principal, if relevant to the issues involved, where the agent, in making the admission, was acting within the scope of his authority, . . .'"¹ Having reviewed that motion, the testimony and schedules objected to, and the responses filed by other parties, the Commission will grant the motion. The record does not establish the scope of the declarant's agency.

Discussion

As required by the procedural schedule, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its position with respect to each issue. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

The issues formulated by the parties and filed on October 2, 2002, are as follows:²

- 1. Since February 19, 2001 (for all Complainants excluding Grand River Mutual and Fidelity Communication Services), since September 20, 2001 (for Grand River), and since November 23, 2001 (for Fidelity Communication), has T-Mobile terminated wireless-originated traffic to the exchanges of Complainants via the transit services or facilities of SBC?**
- 2. Since February 19, 2001 (for all Complainants excluding Grand River and Fidelity Communication), since September 20, 2001 (for Grand River), and since November 23, 2001 (for Fidelity Communication), has Western Wireless terminated wireless-originated traffic to the exchanges of Complainants via the transit services or facilities of SBC?**

¹ *Bynote v. National Super Mkts.*, 891 S.W.2d 117, 124 (Mo. banc 1995), quoting *Roush v. Alkire Truck Lines*, 299 S.W.2d 518, 521 (Mo. 1957), itself quoting 31 C.J.S. *Evidence* § 343.

² For consistency, the Commission has replaced references to "VoiceStream" with "T-Mobile" and references to "SWBT" with "SBC."

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3. Has T-Mobile terminated such traffic in the absence of an agreement with Complainants regarding compensation?

4. Has Western Wireless terminated such traffic in the absence of an agreement with Complainants regarding compensation?

5. Has T-Mobile violated the terms of its Commission-approved interconnection agreement with SBC by sending traffic to SBC for termination in Complainants' exchanges without first obtaining a compensation or interconnection agreement?

6. Has Western Wireless violated the terms of its Commission-approved interconnection agreement with SBC by sending traffic to SBC for termination in Complainant exchanges without first obtaining a compensation or interconnection agreement?

7. Does T-Mobile owe compensation to Complainants for such traffic terminated during this time? What are the legal and factual bases for such compensation?

8. Does Western Wireless owe compensation to Complainants for such traffic terminated during this time? What are the legal and factual bases for such compensation?

9. Has SBC violated the terms of its Commission-approved interconnection agreements with T-Mobile and Western Wireless by allowing them to transit wireless-originated traffic to Complainants in the absence of a compensation or interconnection agreement?³

10. Is SBC liable for Complainants' wireless tariff charges associated with the traffic T-Mobile and Western Wireless terminated to Complainants?⁴

The issues formulated by the parties and filed on October 29, 2003, and the parties' positions on those issues, are as follows:

11. **Unopposed InterMTA Factors:** The interMTA factors listed below were negotiated between eleven (11) Complainants and Respondent wireless carriers, and are not opposed by any party. Should the Commission adopt these factors for the purpose of determining interMTA traffic in this complaint case?

- (a) Cass County Telephone Co. interMTA factor - 0%
- (b) Citizens Telephone Co. interMTA factor - 0%
- (c) Fidelity Comm. Services I, Inc. interMTA factor - 5%
- (d) Fidelity Telephone Co. interMTA factor - 5%
- (e) Grand River Mutual Tel. Corp. interMTA factor - 6%
- (f) Green Hills Telephone Corp. interMTA factor - 0%
- (g) Holway Telephone Co. interMTA factor - 0%
- (h) IAMO Telephone Co. interMTA factor - 0%
- (i) Kingdom Telephone Co. interMTA factor - 0%
- (j) KLM. Telephone Co. interMTA factor - 0%
- (k) Lathrop Telephone Co. interMTA factor - 0%

³ Complainants have dismissed their claims against SBC.

⁴ Complainants have dismissed their claims against SBC.

Complainants: Yes.

Staff: Yes, the Commission should adopt these factors negotiated and agreed to by the Wireless Carriers and the Complainants.

SBC: SBC Missouri does not contest these factors.

Wireless Carriers: T-Mobile and Western support the adoption of these interMTA factors. T-Mobile and Western believe that negotiation of mutually-agreed interMTA factors is the best method to reach resolution of this issue.

12. Contested InterMTA Factors: The interMTA factors listed below were negotiated between three (3) Complainants and Respondent wireless carriers, and are opposed by SBC Missouri. Should the Commission adopt these factors for the purpose of determining interMTA traffic in this complaint case?

- (a) **BPS Telephone Co. interMTA factor - 52%**
- (b) **Craw-Kan Telephone Coop. interMTA factor - 53%**
- (c) **Mark Twain Rural Tel. Co. interMTA factor - 53%**

Complainants: Yes. The interMTA factors that were negotiated between Complainants and the Respondent wireless carriers are based upon the way the Complainants' exchanges are located within Missouri's Local Access and Transport Areas (LATAs) and Metropolitan Trading Areas (MTAs), as well as the service areas of the Respondent wireless carriers and the way in which they interconnect with the landline network. In Mark Twain Rural Telephone Company's case, the agreed to factor was further supported by a traffic study performed by Mark Twain Rural.

Staff: The Commission should adopt these factors negotiated and agreed to by the Wireless Carriers and the Complainants.

SBC: No. Complainants have not met their burden of proof in that they have failed to present sufficient evidence to enable the Commission to determine appropriate factors with any degree of accuracy.

Wireless Carriers: T-Mobile and Western support the adoption of these interMTA factors. T-Mobile and Western believe that negotiation of mutually-agreed interMTA factors is the best method to reach resolution of this issue.

13. Burden of Proof: Who has the burden of proof on the interMTA factors that will be used for the purpose of determining interMTA traffic in this complaint case?

Complainants: In a complaint case, the complainants generally have the burden of proof. In this case, the Complainants have clearly demonstrated that Respondent wireless carriers are sending traffic to Complainants' exchanges (via Respondent SBC) without appropriate compensation. Complainants are unable to distinguish between the uncompensated interMTA and intraMTA traffic because it is delivered by SBC over common trunk groups. The

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carriers responsible for originating and delivering the traffic – Respondent SBC and the Respondent wireless carriers – have not produced jurisdictional information about the traffic. Under these circumstances, Complainants have met their initial burden and should not be required to face an additional burden of proof. Nonetheless, Complainants have submitted sufficient evidence to support the interMTA factors that were negotiated with the Respondent wireless carriers.

Staff: The Wireless Carriers and the Complainants have agreed on interMTA factors. Staff supports the concept of these parties negotiating and agreeing on these factors.

SBC: Complainants have the burden of proving the accuracy of their proposed interMTA factors as a necessary element of their claim.

Wireless Carriers: T-Mobile and Western have no position as to which party has the burden of proof on the interMTA factors.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to “make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises.”⁵ Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to “every decision and order in a contested case,” to fill in the gaps of Section 386.420.⁶ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.⁷ Nonetheless, the following formulation is often cited:

⁵ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

⁶ *State ex rel. Laclede Gas Co. v. PSC of Mo.*, 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *State ex rel. Noranda Aluminum, Inc. v. PSC*, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

⁷ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁸

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”⁹ Findings of fact are also inadequate that “provide no insight into how controlling issues were resolved” or that are “completely conclusory.”¹⁰

With these points in mind, the Commission renders the following Findings of Fact.

The Parties:

The Commission finds that Complainant BPS Telephone Company is a Missouri corporation whose principal place of business is located in Bernie, Missouri. BPS provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 3,900 subscribers in three exchanges.

The Commission finds that Complainant Cass County Telephone Company is a Maryland limited partnership whose principal place of business is located in Peculiar, Missouri. Cass County provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 8,400 subscribers in six Missouri exchanges.

The Commission finds that Complainant Citizens Telephone Company is a Missouri corporation whose principal place of business is located in Higginsville, Missouri. Citizens provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 4,400 subscribers in one Missouri exchange.

The Commission finds that Complainant Craw Kan Telephone Cooperative is a Kansas corporation whose principal place of business is located in Girard, Kansas. Craw-Kan provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 2,730 subscribers in nine Missouri exchanges.

The Commission finds that Complainant Fidelity Telephone Company is a Missouri corporation whose principal place of business is located in Sullivan, Missouri. Fidelity provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 17,000 subscribers in nine Missouri exchanges.

⁸ *Id.* (quoting 2 Am.Jur.2d Administrative Law § 455, at 268).

⁹ *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting *State ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

¹⁰ *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *State ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

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The Commission finds that Complainant Fidelity Communications Services I, Inc., is a Missouri corporation whose principal place of business is located in Sullivan, Missouri. Fidelity I provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 3,000 subscribers in the Rolla, Missouri, exchange.

The Commission finds that Complainant Grand River Mutual Telephone Corporation is a Missouri corporation whose principal place of business is located in Princeton, Missouri. Grand River provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 15,000 subscribers in 32 Missouri exchanges.

The Commission finds that Complainant Green Hills Telephone Corporation is a Missouri corporation whose principal place of business is located in Breckenridge, Missouri. Green Hills provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 3,959 subscribers in 13 Missouri exchanges.

The Commission finds that Complainant Holway Telephone Company is a Missouri corporation whose principal place of business is located in Maitland, Missouri. Holway provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 560 subscribers in two Missouri exchanges.

The Commission finds that Complainant IAMO Telephone Company is an Iowa corporation whose principal place of business is located in Coin, Iowa. IAMO provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 1,260 subscribers in four Missouri exchanges.

The Commission finds that Complainant KLM Telephone Company is a Missouri corporation whose principal place of business is located in Rich Hill, Missouri. KLM provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 1,700 subscribers in four Missouri exchanges.

The Commission finds that Complainant Kingdom Telephone Company is a Missouri corporation whose principal place of business is located in Auxvasse, Missouri. Kingdom provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 4,400 subscribers in seven Missouri exchanges.

The Commission finds that Complainant Lathrop Telephone Company is a Missouri corporation whose principal place of business is located in Lathrop, Missouri. Lathrop provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 1,550 subscribers in the Lathrop exchange.

The Commission finds that Complainant Mark Twain Rural Telephone Company is a Missouri corporation whose principal place of business is located in Hurdland, Missouri. Mark Twain provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 4,844 subscribers in 14 Missouri exchanges.

The Commission finds that Respondents VoiceStream Wireless Corporation and Western Wireless Corporation are wireless or commercial mobile radio

service (CMRS) telecommunications service providers certificated by the Federal Communications Commission ("FCC").¹¹ Western Wireless owned VoiceStream, now known as T-Mobile USA, Inc., during the period that is the subject of these complaints, but Western Wireless does not now own T-Mobile.¹² In 2000, T-Mobile acquired Aerial Communications and Aerial continues to be a component of T-Mobile. Western Wireless uses cellular technology while T-Mobile uses PCS technology.

The Commission finds that Respondent Southwestern Bell Telephone Company, L.P., doing business as SBC Missouri ("SBC"), is a telephone company that provides, and at all times herein pertinent provided, basic local, interexchange, and exchange access telecommunications services, among others.¹³

Basic Telephony:

Each of the Complainants is an incumbent local exchange carrier ("ILEC") that provides basic local telephone service in one or more exchanges by means of a central office or switch and a network of radiating local loops.¹⁴ Each local loop directly connects a subscriber's telephone to the central office or switch of the exchange in which the subscriber is located.¹⁵ Each of the Complainants is regulated by this Commission and operates pursuant to tariffs filed with and approved by this Commission.¹⁶ Under Complainants' Commission-approved tariffs, subscribers typically pay a fixed monthly rate for unlimited local telephone service.¹⁷ Intrastate wireline calls between exchanges or local calling scopes are

¹¹ Collectively, the Commission refers to T-Mobile (VoiceStream) and Western Wireless herein as the "Wireless Respondents."

¹² The Commission will refer to Respondent T-Mobile by its present name rather than its former name throughout this Order.

¹³ SBC is here termed a Respondent because that is the role SBC has played throughout this litigation. However, Complainants have moved to dismiss all claims against SBC.

¹⁴ An "incumbent local exchange carrier" is "a local exchange telecommunications company authorized to provide basic local telecommunications service in a specific geographic area as of December 31, 1995, or a successor in interest to such a company," Section 386.020(22); an "exchange," in turn, is "a geographical area for the administration of telecommunications services, established and described by the tariff of a telecommunications company providing basic local telecommunications service." Section 386.020(16). "Basic local telephone service" is "two-way switched voice service within a local calling scope" and any of several additional services, including emergency (911) service, operator service, and exchange access service. Section 386.020(4). More simply, an ILEC is the telephone company that owns and operates the physical network in an exchange. There are also local exchange carriers ("LECs") that do not own local networks. See *Newton's Telecom Dictionary* 403 (19th ed., 2003).

¹⁵ *Newton's* 472, 477.

¹⁶ A "tariff" is a document that sets out the rates, charges, rules, and regulations governing the services provided by a regulated public utility, including a regulated telecommunications carrier. See Section 386.020(45): "'Rate', every individual or joint rate, fare, toll, charge, reconsigning charge, switching charge, rental or other compensation of any corporation, person or public utility, or any two or more such individual or joint rates, fares, tolls, charges, reconsigning charges, switching charges, rentals or other compensations of any corporation, person or public utility or any schedule or tariff thereof."

¹⁷ *Newton's* 473.

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carried by an interexchange carrier ("IXC").¹⁸ Subscribers pay by the minute for such long distance or toll calls pursuant to the IXC's Commission-approved tariffs. The IXC, in turn, pays originating access charges to the ILEC on whose network the call originated and pays terminating access charges to the ILEC on whose network the call terminated pursuant to the Commission-approved exchange access tariffs of those ILECs.¹⁹

Respondent SBC, like the Complainants, is also an ILEC regulated by this Commission. However, SBC is a very large ILEC and operates 160 local exchanges in Missouri with over 200 switches.²⁰ SBC also provides intraLATA and interLATA long distance service in Missouri as an IXC regulated by this Commission. Unlike the other parties to this case, SBC is also a Regional Bell Operating Company ("RBOC"), one of the operating entities divested by AT&T on December 31, 1983, pursuant to the modified final judgment that ended the federal antitrust case against AT&T.²¹

Respondents T-Mobile and Western Wireless are cellular or wireless telephone companies. They are not regulated by this Commission, but by the FCC. They do not file tariffs, either with this Commission or with the FCC.

Wireless carriers design their networks based on the volume of traffic that they expect to trade with specific exchanges, selecting the most cost efficient option of those available. In some cases, the best choice is indirect interconnection at a tandem switch. In other cases, the lower cost option is termination through an IXC. In the present case, the Wireless Respondents interconnected with the Complainants indirectly through the SBC tandem in each LATA.

¹⁸ An "interexchange telecommunications carrier" is "any company engaged in the provision of interexchange telecommunications service," Section 386.020(23), which in turn is "telecommunications service between points in two or more exchanges." Section 386.020(24). In short, IXCs provide long distance telephone service. See *Newton's* 414, 475.

¹⁹ "Exchange access service", a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service." Section 386.020(17). Long distance calls must use the local telephone company's network in order to access the local loop that connects to the subscriber's telephone. The IXC must compensate the ILEC for this use of its facilities. See *Newton's* 304.

²⁰ See *In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri*, Case No. TR-2001-65 (*Report & Order*, issued Aug. 26, 2003) at p. 9.

²¹ *Newton's* 661. SBC Missouri's parent, SBC Communications, originally owned only Southwestern Bell Telephone but has since acquired Ameritech, including Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell, Pacific Telesis, including Pacific Bell and Nevada Bell, and Southern New England Telephone Company. *Id.*

MTAs and LATAs:

The Commission finds that, pursuant to its statutory authority, the FCC has defined certain geographical areas termed Major Trading Areas ("MTAs").²² Most of Missouri is contained in either the St. Louis MTA or the Kansas City MTA; however, Pemiscot County is in the Memphis MTA and Clark County is in the Des Moines MTA. The FCC has determined that, for the purposes of the Telecommunications Act of 1996, the local calling scope of a CMRS carrier shall be the MTA. Consequently, a call to or from a wireless subscriber that does not cross a MTA boundary is a local call; conversely, a call to or from a wireless subscriber that does cross a MTA boundary is a long distance or toll call.

The modified final judgment that ended the federal anti-trust litigation against AT&T established almost 200 Local Access and Transport Areas ("LATAs") in the United States. LATAs define the areas within which the RBOCs, including SBC, were permitted to transport and deliver traffic under the original terms of the modified final judgment. There are four LATAs in Missouri: St. Louis, Kansas City, Springfield, and the Columbia-Jefferson City area (the Westphalia LATA).²³

Complainants' Tariffs:

The Commission finds that each of the Complainants has a Commission-approved Wireless Termination Tariff that was in effect at all times herein pertinent, beginning on February 19, 2001.²⁴ The Complainants' Wireless Termination Tariffs contain rates, terms and conditions applicable to the termination of intraMTA, wireless-originated traffic delivered via the transit service or facilities of an intermediate LEC such as SBC.²⁵

The Commission finds that each of the Complainants has a Commission-approved intrastate exchange access tariff that was in effect at all times herein pertinent. Most of the Complainants have concurred in the Oregon Farmers Exchange Access Tariff, that is, they have adopted that tariff as their own. The Complainants' exchange access tariffs contain rates, terms and conditions applicable to the termination of long distance traffic, including intrastate, interMTA, wireless-originated traffic delivered via the transit service or facilities of an intermediate LEC such as SBC.

Interconnection Agreements:

The United States Congress enacted the Telecommunications Act of 1996 in order to encourage competition in the telecommunications industry and thereby encourage the benefits of lower prices and increased technological innovation.²⁶ Local telephone companies are no longer protected monopolies but are required

²² *Newton's* 488.

²³ *See Newton's* 456-7.

²⁴ Approved by the Commission in *In the Matter of Mark Twain Rural Telephone Company*, Case No. TT-2001-139 (*Report & Order*, issued February 8, 2001); *aff'd*, *St. ex rel. Sprint Spectrum, L.P., d/b/a Sprint PCS, et al., v. Missouri Public Service Commission*, 112 S.W.3d 20 (Mo. App., W.D. 2003).

²⁵ *See below*, SBC's Transit Service, *infra* at p. 16.

²⁶ Public Law 104-104, 110 Stat. 56, *codified in* Title 47, United States Code.

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to share their networks with competitors.²⁷ A fundamental aspect of the Telecommunications Act is the obligation imposed on telephone companies to interconnect with other telephone companies. The Act contemplates that such interconnections will be governed by interconnection agreements, which the Act requires be approved by the appropriate State Commission.²⁸

The Commission finds that neither T-Mobile nor Western Wireless had a Commission-approved interconnection agreement in effect with any of the Complainants at any time pertinent to this matter. The Commission further finds that SBC had a Commission-approved interconnection agreement with both T-Mobile and Western Wireless at all times herein pertinent, as well as with each of the Complainants.

SBC's Transit Service:

The Commission finds that, in addition to other telecommunications services, SBC offers, and at all times herein pertinent offered, a transit service to CMRS providers such as T-Mobile and Western Wireless, whereby wireless calls originated by customers of the CMRS providers are transported to landline customers of local telephone companies, including Complainants. SBC provides this transit service either pursuant to its Commission-approved, intrastate wireless interconnection tariff or under an interconnection agreement with the originating CMRS carrier. SBC delivers such traffic over common trunk groups owned by SBC, commingled with other traffic. None of the Complainants are able to distinguish the wireless-originated traffic from other interexchange traffic delivered by SBC over the same trunk groups and are thus unable to block such traffic, even in cases in which the originating CMRS carrier had refused to pay for termination. SBC measures the traffic that it transits each month and provides a report, called the Cellular Transiting Usage Summary Report ("CTUSR"), to the Complainants. The CTUSR is summary in form and shows only the number of minutes of traffic delivered for each originating CMRS provider. The CTUSR does not distinguish interMTA traffic from intraMTA traffic.

²⁷ *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 371-73, 119 S.Ct. 721, 726-27, 142 L.Ed.2d 835, 844-46 (1999): "The Telecommunications Act of 1996 . . . fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC's obligation . . . to share its network with competitors. Under this provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network. When an entrant seeks access through any of these routes, the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or § 251(c)."

²⁸ 47 U.S.C. § 252(a)(1) and (e).

The Traffic at Issue:

The record shows, and the Commission finds, that SBC delivered wireless originated traffic from subscribers of T-Mobile and Western Wireless to subscribers of each of the Complainants during the period herein at issue.²⁹ The exact amount of the traffic is highly confidential. Each such call originated at a wireless telephone or "cell phone," was then transmitted to a radio tower and further transmitted by wire and the CMRS provider's switch to the point of interconnection ("POI") with SBC. From that point, the traffic was then transported over SBC's network and through its tandem switch to SBC's POI with the particular Complainant whose subscriber was called and was then transported over that Complainant's network, through its switch and over its local loop, terminating finally at the telephone of the called subscriber. The "cell phone" user that originated each such call paid either T-Mobile or Western Wireless for the service. T-Mobile or Western Wireless then paid SBC and any other carrier involved in transiting the call, but made no payment to any of the Complainants. Although each of the Complainants has demanded payment from T-Mobile and Western Wireless, no payments have been received and Respondents refuse to pay.

The Commission finds that some of the traffic described above crossed an MTA boundary and is therefore interMTA, long distance traffic.³⁰ None of the Complainants is able to measure or even distinguish interMTA traffic from intraMTA traffic. The CTUSR report provided by SBC to Complainants does not distinguish interMTA traffic from intraMTA traffic.

The Wireless Respondents maintain that the intraMTA traffic that they exchange with the Complainants is symmetrical, that is, that equivalent volumes flow in both directions. Their expert witness testified, "Well, it's our experience that when calls are routed from mobile to land and land to mobile under the MTA rules as non-toll traffic, that traffic is roughly in balance between a wireless carrier and a wireline carrier."³¹ The record shows, and the Commission finds, that the Complainants routed all traffic originating on their networks and intended for subscribers of the Wireless Respondents through an IXC.

²⁹ The Wireless Respondents' witness testified: "I don't dispute the fact that we generate traffic, that that traffic is transited through SBC's network and terminated to independent telephone companies." Tr. 4:117. These amounts have continued to grow during the life of this case and, on December 8, 2003, counsel for Respondents described the amount owed by T-Mobile as "several hundred thousand dollars" and by Western Wireless as "something in the tens of thousands[.]" Tr. 6:370. Thus, the Wireless Respondents do not deny that they originated the traffic and delivered it to SBC for termination to the Complainants' subscribers, over the Complainants' networks. See Tr. 6:370-1.

³⁰ The Wireless Respondents' witness admitted this liability: "Yes, we're responsible for the traffic generated from our networks that is inter-MTA traffic that is terminated to the Complainants." Tr. 4:160; and see Tr. 4:115-116, 119, 123.

³¹ Tr. 4:126.

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The Factual Stipulation:

The parties stipulated to the following facts on October 10, 2002, and the Commission so finds:³²

1. On a monthly basis, Complainants have sent invoices to T-Mobile and Western Wireless specifying the minutes terminated to each Complainant's exchange(s), the applicable rate, the total amount due, and payments made, if any. All written correspondence and verbal communications reflecting additional efforts to bill and collect the amounts sought by Complainants in this case from VoiceStream and Western Wireless for the traffic they originated are attached to or set forth in the Direct Testimony of each Complainant's witness, filed August 26, 2002.
2. Complainant BPS Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.
3. Complainant Cass County Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.
4. Citizens Telephone Company of Higginsville on July 26, 2001, asked Southwestern Bell for an estimate of the cost to block Southwestern Bell Mobile Systems', U.S. Cellular's and Western Wireless' traffic from being delivered to Citizens' exchanges. Southwestern Bell provided a cost estimate of \$4,000 on August 21, 2001 to Citizens. Believing the cost of blocking may exceed the benefit to be obtained from blocking, Citizens did not ask Southwestern Bell to block any wireless-originated traffic.
5. Complainant Craw-Kan Telephone Cooperative, Inc. has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

³² For clarity, the Commission has replaced the name "VoiceStream" with the name "T-Mobile" wherever it occurs in the stipulation.

6. Complainant Fidelity Communications Services I, Inc. has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

7. Complainant Fidelity Telephone Company did not ask Southwestern Bell about the cost of blocking wireless traffic. But based on blocking quotes provided to other companies, Fidelity believed the cost of blocking would exceed the benefit to be obtained from blocking and did not ask Southwestern Bell to block any wireless-originated traffic.

8. Complainant Grand River Mutual Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

9. Green Hills Telephone Corporation on August 27, 2001, asked Southwestern Bell for an estimate of the cost to block Cingular's and U.S. Cellular's traffic from being delivered to Green Hills' exchanges. Southwestern Bell provided a cost estimate of \$700 on October 11, 2001. Believing the cost of blocking may exceed the benefit to be obtained from blocking, Green Hills did not ask Southwestern Bell to block any wireless-originated traffic.

10. Complainant Holway Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

11. Complainant Iamo Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

12. Kingdom Telephone Company on July 26, 2001, asked Southwestern Bell for an estimate of the cost to block Cingular's, U.S. Cellular's and Air Signal/Metro Call's traffic from being delivered to Kingdom's exchanges. Southwestern Bell provided a \$1,500 cost estimate on August 21, 2001. Believing the

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cost of blocking may exceed the benefit to be obtained from blocking, Kingdom did not ask Southwestern Bell to block any wireless-originated traffic.

13. Complainant KLM Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

14. Complainant Lathrop Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

15. Mark Twain Rural Telephone on August 31, 2001, asked Southwestern Bell for an estimate of the cost to block Cingular's, Sprint's, U.S. Cellular's, Air Signal's and AT&T Wireless' traffic from being delivered to Mark Twain's exchanges. Southwestern Bell provided a \$500 cost estimate on October 11, 2001. Believing the cost of blocking may exceed the benefit to be obtained from blocking, Mark Twain did not ask Southwestern Bell to block any wireless traffic.

16. Complainants claim Southwestern Bell has violated its interconnection agreements with T-Mobile and Western Wireless by allowing them to transit wireless-originated traffic to Complainants in the absence of a compensation or interconnection agreement. The contractual provision this claim is based on is Section 3.1.3 of the T-Mobile/Southwestern Bell and Western Wireless/Southwestern Bell interconnection agreements, both of which are quoted on page 10 of Complainants' Complaint.

17. The Staff of the Missouri Public Service Commission does not dispute any of the facts set out in this Factual Stipulation, nor does it object to the Stipulation.

18. The Office of the Public Counsel does not dispute any of the facts set out in this Factual Stipulation, nor does it object to the Stipulation.

InterMTA Factors:

Because the proportion of interMTA traffic to intraMTA traffic was not measured at the time that the traffic at issue in this case was passed and is not recoverable now, the parties attempted to set interMTA factors by negotiation. The Commission

finds that the parties negotiated certain interMTA factors as set out below. No one objected to these factors:³³

Cass County Telephone Company interMTA factor	0%
Citizens Telephone Company interMTA factor	0%
Fidelity Communications Services I, Inc. interMTA factor	5%
Fidelity Telephone Company interMTA factor	5%
Grand River Mutual Telephone Corporation interMTA factor	6%
Green Hills Telephone Corporation interMTA factor	0%
Holway Telephone Company interMTA factor	0%
IAMO Telephone Company interMTA factor	0%
Kingdom Telephone Company interMTA factor	0%
KLM. Telephone Company interMTA factor	0%
Lathrop Telephone Company interMTA factor	0%

These factors were determined as follows. Wireless carriers typically route interLATA calls through IXC carriers for transport and termination. It follows, therefore, and the Commission finds, that all of the traffic at issue in this case is intraLATA traffic because none of it was routed through an IXC. Consequently, “zero” is necessarily the appropriate interMTA factor for all of those Complainants whose exchanges are in both the same LATA and the same MTA as the SBC tandem where the Wireless Respondents are interconnected, because none of the traffic crossed an MTA boundary.

The Commission finds that three of the Complainants have interMTA factors of 5% to 6%. Grand River has over 30 exchanges, all but two of which are in both the Kansas City MTA and the Kansas City LATA. The two other exchanges, which contain 6% of Grand River’s access lines, are in the St. Louis MTA. The Commission finds that this figure is a reasonable approximation of the percentage of wireless-originated traffic delivered to Grand River subscribers that crossed the MTA boundary in the process. The 5% figure for Fidelity and FCS I was reached in a different manner. Those Complainants determined, by a traffic study, that 15% of the traffic terminated to their subscribers by the Wireless Respondents was interMTA traffic. Nonetheless, the two Complainants agreed to the 5% figure.

SBC refused to withdraw its objection to three other factors that were over 50%.³⁴ These three factors were negotiated by the respective Complainants and the Wireless Respondents. The Commission concludes that the record supports a finding that the final three Complainants have interMTA factors over 50%.

³³ The interMTA factors listed were negotiated between eleven Complainants and Respondent Wireless Carriers and are not opposed by any party. SBC did object to them initially, but later withdrew its objection.

³⁴ These interMTA factors were negotiated between the three Complainants and the Wireless Respondents. When offered as a non-unanimous stipulation and agreement, they were opposed by Respondent SBC. However, SBC stated that it would have no objections to these factors if the Commission decided against the secondary liability theory asserted against SBC by the Complainants. The Complainants have since dismissed their claims against SBC and SBC, presumably, would therefore have no further objection to the factors.

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Complainant BPS's Steele exchange is located in the Memphis MTA and contains 52% of its access lines. The Commission finds that this figure is thus a reasonable approximation of the percentage of traffic that would cross the MTA boundary in being transported from the POI at the SBC St. Louis tandem, in the St. Louis MTA, to BPS's Steele exchange.

Approximately 53% of Complainant Craw Kan's access lines are located in its two exchanges in the Springfield LATA, which is in the St. Louis MTA. The Commission finds that this figure is thus a reasonable approximation of the percentage of traffic that would cross the MTA boundary in being transported from the POI at the SBC Kansas City tandem, in the Kansas City MTA, to Craw Kan's two Springfield LATA exchanges.

A month-long traffic study for Complainant Mark Twain, based on originating NXXs, suggested that 70% of the traffic is interMTA traffic. Complainant Mark Twain and the Wireless Respondents nonetheless agreed on the 53% factor after negotiation. Based on the traffic study, the Commission finds that 70% of this traffic is interMTA traffic.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The Commission has jurisdiction over this matter pursuant to Section 386.390.1, which authorizes the Commission to hear and determine complaints as to "any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]"

The Commission also has jurisdiction pursuant to Section 386.250, which provides that the "jurisdiction, supervision, powers and duties" of the Missouri Public Service Commission shall extend.³⁵

To all telecommunications facilities, telecommunications services and to all telecommunications companies so far as such telecommunications facilities are operated or utilized by a telecommunications company to offer or provide telecommunications service between one point and another within this state or so far as such telecommunications services are offered or provided by a telecommunications company between one point and another within this state, except that nothing contained in this section shall be construed as conferring jurisdiction upon the commission over the rates charged by a telephone cooperative for providing telecommunications service within an exchange or within a local calling scope as determined by the commission, except for exchange access service[.]

³⁵ Section 386.250(2), RSMo 2000. All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

Burden of Proof:

The Complainants bear the burden of proof in a case, such as this one, in which a regulated utility charges that a customer has refused to pay according to its Commission-approved tariff.³⁶ Thus, Complainants must establish all facts necessary to support the relief they seek by a preponderance of the credible evidence.

Violation of a Law:

A complaint brought under Section 386.390.1 necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision.³⁷ The complaints at issue here assert that the Wireless Respondents have refused to compensate the Complainants for wireless-originated traffic delivered over Complainants' networks to Complainants' subscribers, in violation of Complainants' Wireless Termination Tariffs, in the case of intraMTA traffic, and in violation of Complainants' exchange access tariffs, in the case of interMTA traffic. "A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature."³⁸ Thus, Complainants charge that the Wireless Respondents, in refusing to compensate them according to their tariffs, have violated the law.

Complainants' Right to Compensation:

The "Filed Tariff Doctrine," or Filed Rate Doctrine," governs a utility's relationship with its customers.³⁹ The United States Supreme Court first announced this rule, that the rate of a utility contained in tariffs filed with the appropriate regulatory agency is the only lawful charge from which no deviation is permitted, in 1915.⁴⁰ The utility has no choice and can only collect the proper, tariffed rate for the service rendered.⁴¹ "Pursuant to the filed rate doctrine, carriers have a right, as well as a duty, to recover the proper charges for services performed."⁴²

The Wireless Respondents do not deny the factual basis of the Complainants' action. Their defense is that the Complainants' Wireless Termination Tariffs are unlawful because, under the Doctrine of Pre-emption, such tariffs may no longer be applied to traffic delivered over an interconnection because compensation for such traffic is now to be determined under the Telecommunications Act of 1996.

³⁶*Ahlstrom v. Empire District Electric Company*, 4 Mo.P.S.C.3d 187, 202 (1995); *Margulis v. Union Electric Company*, 30 Mo.P.S.C. (N.S.) 517, 523 (1991).

³⁷*St. ex rel. Ozark Border Electric Cooperative v. PSC*, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

³⁸*A.C. Jacobs and Co., Inc. v. Union Electric Co.*, 17 S.W.3d 579, 582 (Mo. App., W.D. 2000); quoting *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App., E.D. 1997).

³⁹*Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App., E.D. 1997)

⁴⁰*Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97, 59 L. Ed. 853, ___, 35 S. Ct. 494, ___ (1915); *Orscheln Bros. Truck Lines, Inc. v. Ferguson Mfg., Inc.*, 793 S.W.2d 525, 530 (Mo. App., W.D. 1990).

⁴¹*State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 531 (Mo. App., W.D. 1997).

⁴²*Orscheln Bros. Truck Lines, supra*, 793 S.W.2d at 530-31.

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The Commission need not spend much time analyzing the Wireless Respondents' arguments. The very tariffs that the Wireless Respondents are accused of violating have been considered – and upheld – by the Missouri Court of Appeals. That decision is binding on this Commission. The Court stated:⁴³

The rural carriers have a constitutional right to a fair and reasonable return upon their investment. *State ex rel. Mo. Pub. Serv. Comm'n v. Fraas*, 627 S.W.2d 882, 886 (Mo.App. W.D. 1981). The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. *Smith et al. v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591-92, 70 L. Ed. 747, 46 S. Ct. 408 (1926). The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.

The Commission has no choice but to uphold and enforce Complainants' tariffs. For the portion of the traffic that is intraMTA traffic, that tariff is each Complainants' Wireless Termination Tariff. For the portion of the traffic that is interMTA traffic, that tariff is each Complainants' Exchange Access Tariff.

InterMTA Factors:

The record shows that the proportions of intraMTA traffic and interMTA traffic were not measured or recorded at the time the traffic was passed and cannot be recovered now. For 11 of the Complainants, the parties have agreed on interMTA percentages; the remaining traffic is necessarily intraMTA traffic.

For the three other Complainants, SBC refused to join the agreement reached by the other parties. However, an estimate of the interMTA traffic percentage was calculated in each case. The Commission has found those estimates to be reasonable approximations of the traffic percentages in question. The general rule is that, where more accurate information is unavailable, estimates should be considered.⁴⁴ As counsel for Complainants explained at oral argument:⁴⁵

[T]hese three factors are intuitive. They are based upon an examination of where the Complainant exchanges lie within MTA and LATA boundaries and with relation to or reference to the interconnection points where the wireless carriers interconnect with Southwestern Bell's facilities.

* * *

⁴³ *St. ex rel. Sprint Spectrum, L.P. v. Public Service Commission*, 112 S.W.3d 20, 26 (Mo. App., W.D. 2003).

⁴⁴ *State ex rel. Martigney Creek Sewer Co. v. Public Service Com.*, 537 S.W.2d 388, 396 (Mo. banc 1976).

⁴⁵ Tr. 6:351-352.

[I]n Mark Twain's case, Mark Twain did perform a traffic study of sorts. They examined all of the NPA/NXX's from T-Mobile callers that terminated calls to the Mark Twain exchanges and found that approximately 70 percent of those NPA/NXX's, those telephone numbers associated with those originating calls, were located outside the MTA in which Mark Twain's exchanges are located.

The Commission has considered the three estimates at issue and concludes that, in the absence of more accurate information, they represent reasonable approximations of the actual traffic proportions.

Secondary Liability:

Complainants originally asserted claims against SBC, contending that SBC was secondarily liable for the traffic it delivered to Complainants and that SBC must therefore compensate them if T-Mobile or Western Wireless do not. However, Complainants have now dismissed their claims against SBC. Therefore, the Commission need not address the issue of secondary liability in this case.

IT IS THEREFORE ORDERED:

1. That the Motion to Strike Prefiled Direct Testimony, filed by Respondents T-Mobile USA, Inc., formerly known as VoiceStream Corporation, and Western Wireless Corporation on October 4, 2002, is granted. The items struck are: Lines 10-11, Page 6, of the Direct Testimony of David Beier offered on behalf of Fidelity Telephone Company; Lines 17-22, Page 9, of the Direct Testimony of Brian Cornelius offered on behalf of Citizens Telephone Company of Higginsville; Schedules 2 and 3 to the Direct Testimony of Brian Cornelius offered on behalf of Citizens Telephone Company of Higginsville; Lines 2-4, Page 8, of the Direct Testimony of Bill Rohde offered on behalf of Mark Twain Rural Telephone Company; Lines 13-15, Page 5, and Lines 6-7, Page 6, of the Direct Testimony of Randall Boyd offered on behalf of Kingdom Telephone Company; and Schedules 2 and 3 to the Direct Testimony of Randall Boyd offered on behalf of Kingdom Telephone Company.
2. That the Motion to Dismiss Southwestern Bell Telephone Company, doing business as SBC Missouri, filed on January 13, 2005, by BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communications Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, and Mark Twain Rural Telephone Company, is granted.
3. That the Complaints filed herein by BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communications Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, and Mark Twain Rural Telephone Company are sustained insofar as they state claims against Western Wireless Corporation and T-Mobile USA, Inc., formerly known as VoiceStream, for uncompensated, wireless-originated telecommunications traffic delivered to Complainants by SBC Missouri.
4. That the amount due shall in each case be calculated by multiplying the total minutes of traffic by the appropriate interMTA factor to derive interMTA minutes of traffic, which shall

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then be multiplied by the appropriate rate set out in Complainant's Exchange Access Tariff, to which shall be added an amount calculated by multiplying the intraMTA minutes of traffic, calculated by subtracting the interMTA minutes of traffic derived above from the total minutes of traffic, by the appropriate rate set out in Complainant's Wireless Termination Tariff.

5. That to the amount due calculated pursuant to Ordered Paragraph No. 4, above, shall be added interest, late fees, and reasonable attorneys' fees to the extent allowed by Complainants' tariffs previously referred to.

6. That any pending motions not expressly ruled herein are denied.

7. That this Report and Order shall become effective on February 6, 2005.

8. That this case may be closed on February 7, 2005.

Davis, Chm., Murray and Clayton,
CC., concur;
Gaw, C., concurs, with separate
concurring opinion to follow;
and certify compliance with the
provisions of Section 536.080,
RSMo 2000.
Appling, C., not participating.

Concurring Opinion of Commissioner Steve Gaw

I respectfully concur in the decision reached by the majority in its Report and Order issued in the above-captioned proceeding. In its decision, the majority relies upon interMTA factors offered by the parties in order to reach certain conclusions regarding the nature of the traffic originated by customers of T-Mobile and Western Wireless, transited by Southwestern Bell Telephone Company ("SBC") and terminated by the individual Complainants during the period of time beginning on February 19, 2001 .

By this concurrence I wish to make clear that my agreement with the majority is as to its conclusion and not to its rationale. My conclusion is predicated solely on accepting the unanimous agreement of the parties, achieved with the dismissal of SBC. Initially, these three factors were disputed by SBC. As reflected in footnote 34, however, these interMTA factors became unopposed once the complaints against SBC was dismissed.

As such there is now a unanimous argument by the parties. But the opinion takes an additional step and "concludes that the record supports a finding that the final three Complainants have interMTA factors over 50% ." The record in this case does not clearly support these findings on inter/intraMTA factors.

**In the Matter of the Application of Union Electric Company,
Doing Business as AmerenUE, for an Order Authorizing
the Sale, Transfer and Assignment of Certain Assets, Real
Estate, Leased Property, Easements and Contractual Agree-
ments to Central Illinois Public Service Company, Doing
Business as AmerenCIPS, and, in Connection Therewith,
Certain Other Related Transactions.***

*Case No. EO-2004-0108
Decided February 10, 2005*

Electric §4. Having found it to be not detrimental to the public interest, the Commission approved the transfer of operations and facilities from Union Electric Company to Central Illinois Public Service Company.

Electric §4.1. Having found it to be not detrimental to the public interest, the Commission approved the transfer of operations and facilities from Union Electric Company to Central Illinois Public Service Company.

Electric §9. The Commission found that it had jurisdiction over the transfer between an electric and gas corporation and regulated electric and gas utility pursuant to Section 393.190.1, RSMo.

Gas §6. Having found it to be not detrimental to the public interest, the Commission approved the transfer of operations and facilities from Union Electric Company to Central Illinois Public Service Company.

Gas §7. The Commission found that it had jurisdiction over the transfer between an electric and gas corporation and regulated electric and gas utility pursuant to Section 393.190.1, RSMo.

Appearances

Joseph H. Raybuck, Thomas M. Byrne, Edward C. Fitzhenry, and David B. Hennen, Attorneys at Law, Ameren Corporation, 1901 Chouteau Avenue, St. Louis, Missouri 63101, for Union Electric Company, doing business as AmerenUE, and

James B. Lowery, Attorney at Law, Smith, Lewis, 111 South Ninth Street, Suite 200, Columbia, Missouri 65205, for Union Electric Company, doing business as AmerenUE.

James M. Fischer, Attorney at Law, Fischer & Dority, 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Intervenor Kansas City Power & Light Company.

Robert C. Johnson, Attorney at Law, 911 Washington Avenue, St. Louis, Missouri 63101, for Intervenor the Missouri Energy Group.

Diana Vuylsteke, Attorney at Law, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102, for Intervenor the Missouri Industrial Energy Consumers.

* See page 16 for another order in this case.

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John B. Coffman, Public Counsel, and *Douglas E. Micheel*, Senior Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Steven Dottheim, Chief Deputy General Counsel, *Dennis L. Frey*, Senior Counsel, and *Lera L. Shemwell*, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Lewis R. Mills, Jr.

REPORT AND ORDER

Procedural History

On August 25, 2003, Union Electric Company, doing business as AmerenUE (UE), filed its Application for Transfer of Assets, Change in Decommissioning Trust Fund, Waiver of Affiliate Transaction Rules, and Motion for Expedited Treatment seeking authority to transfer certain assets and to complete certain other related transactions. UE originally requested that the Commission approve its application "in the first quarter of 2004."

UE seeks leave to transfer to AmerenCIPS, an affiliated regulated utility, all of its Illinois electric utility service area assets, including certificates of convenience and necessity, permits, licenses, and franchises issued by the state of Illinois and various Illinois counties and municipalities, its retail electric business, customers, transmission and distribution plant, and maintenance and labor agreements, as well as related liabilities. Certain electric service assets, including generating assets located in Venice, Illinois, and Keokuk, Iowa, however, will not be transferred. UE also seeks leave to transfer to AmerenCIPS its gas utility service assets located in the Metro East Service Area, including certificates, franchises, permits, and licenses, general plant, customers, agreements, and related liabilities. UE states that none of these assets are located in the state of Missouri and that, consequently, there will be no impact on the tax revenues of any Missouri political subdivision. UE states that the proposed transaction is in the public interest because it will allow it to reallocate to Missouri its generation capacity presently devoted to its Illinois electric service area, thus providing additional generating capacity to serve its Missouri customers.

In connection with the above transfers, UE prays that the Commission will either find that its affiliate transaction rules do not apply to these transactions or else waive them. UE also prays that the Commission will authorize certain changes to its Nuclear Decommissioning Trust Fund to reflect the proposed transactions. UE states that it has also applied for all other necessary regulatory approvals and that it will close the transactions as soon as the necessary approvals have all been granted.

On August 27, the Commission issued its Order and Notice, establishing a deadline for applications to intervene of September 17. The Missouri Energy Group

(MEG)¹ filed its Application to Intervene on September 15, Kansas City Power & Light Company (KCPL)² filed its Application to Intervene on September 16, and the Missouri Industrial Energy Consumers (MIEC)³ filed its Application to Intervene on September 17. All of the applications were timely and unopposed. The Commission granted intervention as requested on October 6.

The parties were unable to agree on a procedural schedule and the Commission, on December 2, adopted the somewhat longer, but still expedited, schedule proposed by Staff and supported by Public Counsel, MEG, and MIEC.

Pursuant to notice as required by statute, an evidentiary hearing was convened at the Commission's offices in Jefferson City, Missouri, on March 25, 2004, and continued on March 26, March 31, April 1, April 2, and April 7, concluding on April 8. During these seven days of hearing, the Commission heard the testimony of 17 witnesses and received 81 exhibits. Much of the testimony, and many of the exhibits, was Highly Confidential and extensive proceedings were had *in camera*.

The parties filed post-hearing briefs and also filed proposed findings of fact and conclusions of law. The case was submitted on June 9, 2004.

Motion for a Preliminary Order:

On October 4, 2004, pursuant to Commission Rule 4 CSR 240-2.150(4), UE moved for the issuance of a preliminary Report and Order and an opportunity to respond. Public Counsel, on October 4, and Staff, on October 5, opposed the request. The Commission is of the opinion that the parties have already provided ample guidance in this matter and that the public interest would not be served thereby. Consequently, the Commission will deny UE's motion.

First Report and Order

Two days later, on October 6, 2004, the Commission issued its Report and Order, which was to become effective on October 16, 2004 (the "First Report and Order"). The First Report and Order approved the transfer, subject to several conditions found by the Commission to be necessary in order that the transfer would not be detrimental to the public interest. Each of those conditions was directed to a particular potential detriment the Commission found could occur as a result of the transfer. By imposing conditions that addressed those detriments, the Commission adjudged that the transfer, with those conditions, was not detrimental to the public interest and should be approved. AmerenUE timely filed its Application for Rehearing and Alternative Motion for Clarification on October 15,

¹ The Missouri Energy Group is an unincorporated association consisting of Barnes-Jewish Hospital, Emerson Electric Company, Holcim, Inc., Lone Star Industries, Inc., River Cement Company, SSM HealthCare, and St. John's Mercy Health Care. Each of these companies purchases substantial amounts of energy from AmerenUE.

² Kansas City Power & Light Company is itself a regulated Missouri utility.

³ The Missouri Industrial Energy Consumers is an unincorporated association consisting of Alcoa Foil Products, Anheuser-Busch Companies, Inc., The Boeing Company, Ford Motor Company, General Motors Corporation, Hussmann Refrigeration, ISP Minerals, Monsanto Company, Pfizer, Precoat Metals, Procter & Gamble Manufacturing, Nestlé Purina, and Solutia. Each of these companies is a large customer of AmerenUE.

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2004. Public Counsel also timely filed its Application for Rehearing on that day. AmerenUE, Staff, Public Counsel, and MIEC subsequently filed pleadings respecting the Applications for Rehearing. On December 30, 2004, the Commission granted both Applications for Rehearing, set aside the First Report and Order, and re-assigned this case to the undersigned Regulatory Law Judge as required by Section 536.083, RSMo. Additional pleadings have also been filed since that time.

The Applications for Rehearing

AmerenUE's Application for Rehearing claimed a number of errors in the First Report and Order, some of which are discussed here. AmerenUE first alleged that the Commission exceeded its authority by, as AmerenUE asserted, effectively requiring AmerenUE to hold harmless ratepayers from potential detriments from the transfer that AmerenUE alleged had not been sufficiently established in the record. AmerenUE alleged that this unlawfully shifted the burden of production with respect to the alleged detriments to AmerenUE and away from the proponents of the detriments. AmerenUE's basis for this allegation was that the law required those who allege that potential detriments exist to go forward with sufficient evidence to establish that the detriments are presently existing and likely to occur. Related to AmerenUE's first allegation of error was its claim that the Commission misinterpreted or misapplied *AG Processing, Inc. v. Pub. Serv. Comm'n.*⁴ AmerenUE claimed that none of the issues relating to the detriments alleged to exist by Staff and Public Counsel were "necessary or essential" within the meaning of the AG Processing decision and therefore the Commission should not have denied the transfer, or imposed conditions on its approval, based upon those detriments. AmerenUE argued that the Commission further misapplied AG Processing by assuming, for purposes of the cost-benefit analysis performed by the Commission, that the alleged detriments would occur at the worst possible level supported by the record but that the benefits of the transfer would be at the minimal levels supported by the record. Another central allegation of error by AmerenUE was that the Commission had no authority to impose conditions in the absence of a utility's consent. AmerenUE also alleged several other errors. AmerenUE also sought clarification of several matters in the First Report and Order regardless of whether or not the Commission ultimately granted rehearing.

AmerenUE also argued that two of the conditions included in the First Report and Order were not only unlawful, but would prevent it from completing the transfer, namely, conditions relating to certain liabilities that might later appear based upon events or occurrences that took place prior to closing of the transfer and relating to the transfer of energy from AmerenUE to its affiliates at incremental cost rather than at a market price. AmerenUE advised the Commission in its Application for Rehearing that it would be willing to consent to all of the conditions imposed by the Commission in the First Report and Order, except those two. AmerenUE also provided the Commission with modified conditions addressing the liabilities and energy transfer issues.

⁴ 120 S.W.3d 732 (Mo. banc 2003).

Public Counsel's Application for Rehearing also alleged errors on the part of the Commission. While AmerenUE alleged that the Commission had overstated the detriments and understated the benefits, Public Counsel alleged the opposite was true. Public Counsel alleged that no generation-related savings existed and that the Commission's finding that a small level of generation-related saving existed was in error. Public Counsel also alleged that the Commission had failed to properly consider a negative tax impact relating to sulfur dioxide (SO₂) emission allowances, failed to recognize that AmerenUE is entitled to all output from the Electric Energy, Inc. plant in Joppa, Illinois, and assigned other errors.

Other Proceedings Occurring After the Applications for Rehearing Were Filed

In addition to the pleadings filed by AmerenUE, Staff, and MIEC, as referenced above, after granting rehearing the undersigned Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000, issued other orders. First, on December 30, 2004, an Order Directing Filing was issued requiring AmerenUE to provide certain additional analyses reflecting scenarios that would take into account the possible later addition of the load of Noranda Aluminum, Inc., which is the subject of a separate docket pending at the Commission, Case No. EA-2005-0180. AmerenUE has since filed the requested analyses as required by the December 30, 2004 Order and Staff and Public Counsel filed responses thereto on February 7, 2005, as also ordered by the Commission. An Order Scheduling an On-the-Record Session was also issued on January 12, 2005. An on-the-record session was held on January 19, 2005.

After the on-the-record session, as requested by a Commissioner, AmerenUE filed a Motion to Issue Report and Order After Rehearing which included a proposed Report and Order on Rehearing.

This Report and Order on Rehearing

Section 386.500.1, RSMo 2000, governs the Commission's proceedings on rehearing. If the Commission determines that its First Report and Order to be in any part unjust, unwarranted, or in need of change, then the Commission may abrogate, change or modify the order or decision. Section 386.500.4, RSMo. In its December 30, 2004 Order Granting Rehearing and Re-Assigning Case, the Commission vacated the First Report and Order. This Report and Order on Remand replaces the Report and Order issued on October 6, 2004. Much of this order is the same as the earlier one; the salient changes are to two of the conditions imposed on the transfer and to the attendant discussion of those conditions; this order also addresses points raised by Public Counsel in its application for rehearing. The Commission also finds that the Order Directing Filing dated December 30, 2004, and the analyses requested thereby are not necessary to its decision on rehearing because the existing record is adequate to support this modified order.

Specifically, this Report and Order on Remand is based upon the original record in this case, and is not based upon the filings of the parties made in response to the December 30, 2004 Order Directing Filing or on filings of the parties made in response to any of those filings, and provides for each and every condition the

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Commission found necessary to render the transfer not detrimental to the public interest in the First Report and Order, except two of those conditions. Those two conditions were required in order to protect Missouri ratepayers against specific potential detriments and were found in Ordering Paragraphs 4 and 6 of the First Report and Order. The Commission has imposed alternative conditions directed toward each of those two, specific potential detriments that appropriately protect the public interest. The Commission specifically finds, based upon the existing record in this case and without consideration of the filings made by AmerenUE or other parties in response to the Order Directing Filing dated December 30, 2004, or in response to those filings, that those modified conditions, together with the other original conditions, adequately and fairly protect Missouri ratepayers and cause the transfer to not be detrimental to the public interest.

Adoption of the Existing Record

The Commission hereby adopts, for the purposes of rehearing, the existing record in this case. The Commission finds that with the original conditions retained in this order, together with the two additional conditions which address the potential detriments identified in the First Report and Order, additional evidentiary hearings are not necessary. Additional evidentiary hearings are not necessary because the conditions imposed by this Report and Order on Rehearing and the existing record adequately address the potential detriments appearing of record. The Commission finds that the arguments of Staff, Public Counsel, and others to the effect that an additional evidentiary record is necessary in order to develop the mechanics of how AmerenUE would meet its burden to prove that benefits attributable to the transfer exceed the potential detriment relating to the liabilities and incremental cost pricing of energy transfers to affiliates as discussed in more detail later in this order, are not well taken. A further record in this case is not necessary as it remains AmerenUE's legal burden to prove, by a preponderance of the evidence as provided for herein, that those benefits exist and exceed the potential detriments. If AmerenUE fails to convince the Commission by evidence, however presented, then AmerenUE (and, effectively, AmerenUE's shareholders), will bear the consequences associated with the two detriments at issue – the subject liabilities or incremental cost pricing under the Joint Dispatch Agreement ("JDA"), as discussed below – as the case may be. Staff, Public Counsel, and any other proper parties in future AmerenUE rate cases will have a full and fair opportunity to challenge AmerenUE's effort to meet its burden as to those two conditions, and the Commission will have the opportunity to rule, consistent with law and the record, on whether AmerenUE has or has not met that burden.

Issues

Because contested cases before the Commission often do not include issue framing pleadings, the Commission generally directs the parties in cases pending before it to jointly develop and file a list of issues for determination by the Commission. Shortly before the hearing, the parties must each file a statement of position on each issue. In this way, the contested issues are framed for decision.

In the present case, the parties were unable to develop a joint list of issues and the principal litigants – UE, Staff and the Public Counsel – each submitted a list. Due to the delay occasioned by the parties' inability to agree, the issues lists and the position statements were submitted together. To reproduce the entirety of any of those documents here would needlessly consume many pages of text. Furthermore, some of the issues and position statements are designated Highly Confidential and cannot be set out here. Therefore, the Commission will briefly summarize the parties' principal contentions. Further details, so far as necessary to understand the Commission's Order, will be set out in the Findings of Fact and Conclusions of Law that follow.

The transaction proposed by UE has been summarized above, on pages 3 and 4 of this Report and Order. UE asserted that, if the proposed transaction were approved, certain benefits would be realized, including the addition of nearly 600 megawatts (MWs) of low-cost, coal-fired, base-load generation to serve UE's Missouri customers. Other benefits include reducing UE to a one-state utility operation, subject at the state level only to this Commission, and no longer subject to the competing requirements of the Illinois Commerce Commission (I.C.C.). If the transaction were not approved, on the other hand, UE warned that it might not have sufficient generating capacity to meet its needs, perhaps as early as the summer of 2004. Finally, UE argued that the governing legal standard requires the Commission to approve the proposed transaction unless it is found that approval will cause a certain, immediate and calculable detriment to the public interest.

The Commission's Staff and the Public Counsel opposed the proposed transaction, contending that it would indeed cause substantial detriments to the public interest and that the benefits asserted by UE are illusory. In particular, Staff and the Public Counsel argued that the generation assets the transfer would make available are neither the best nor the least expensive alternative for providing additional capacity for the future. In addition, they asserted that the transfer would unreasonably expose Missouri ratepayers to the risk of future, "hidden" costs of significant magnitude. Their position is that the governing legal standard does not permit the Commission to approve a transaction of this sort if doing so will expose ratepayers to an unreasonable risk of higher rates in the future.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission has considered the positions and arguments of all of the parties in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider it, but indicates rather that the omitted material was not dispositive.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises."⁵ Because Section 386.420 does

⁵ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

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not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to “every decision and order in a contested case,” to fill in the gaps of Section 386.420.⁶ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.⁷ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁸

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”⁹ Findings of fact are also inadequate that “provide no insight into how controlling issues were resolved” or that are “completely conclusory.”¹⁰

With these points in mind, the Commission renders the following Findings of Fact.

The Parties:

UE, the Applicant, is a traditional, vertically-integrated electric and gas utility that presently provides retail electric and gas services to the public in both Missouri and Illinois. As a “vertically-integrated” electric utility, UE is engaged in the generation, transmission and retail distribution of electricity. UE’s Missouri operations are regulated by this Commission and its Illinois operations are regulated by the I.C.C. Various federal agencies, including the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Agency (NRA) also regulate aspects of UE’s operations. UE serves 1.167 million retail electric customers in Missouri and 62,000 in Illinois, and 112,000 retail gas customers in Missouri and 18,000 in Illinois. UE’s Illinois retail electric operations constitute about 6 percent of its total

⁶ *State ex rel. Laclede Gas Co. v. PSC of Mo.*, 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *State ex rel. Noranda Aluminum, Inc. v. PSC*, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

⁷ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

⁸ *Id.* (quoting 2 Am.Jur.2d Administrative Law § 455, at 268).

⁹ *State ex rel. Int’l. Telecharge, Inc. v. Mo. Pub. Serv. Comm’n*, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting *State ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

¹⁰ *State ex rel. Monsanto Co. v. Pub. Serv. Comm’n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *State ex rel. Rice v. Pub. Serv. Comm’n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

retail electric operations; its Illinois natural gas customers are about 16 percent of its total gas customers. UE's Missouri electric rates are frozen until June 30, 2006, as a result of Case No. EC-2002-1. UE's Missouri natural gas rates are frozen until June 30, 2006, as a result of Case No. GR-2003-0517.

UE is owned by a publicly-traded, registered holding company, Ameren Corporation (Ameren), that is not a regulated utility. Ameren owns other companies in addition to UE, some of which are also regulated utilities, such as AmerenCIPS (CIPS) and AmerenCILCO, operating in Illinois, and some of which are not. Ameren owns Ameren Energy Resources Company that, in turn, owns Ameren Energy Marketing Company (AEM), an unregulated company engaged in the sale of electricity at wholesale, and Ameren Energy Generating Company (AEG or Genco), an unregulated company engaged in the generation of electricity for sale at wholesale. Genco's generating assets, located in Illinois, formerly belonged to CIPS.

Of the intervenors, two – MEG and MIEC – are associations of industrial customers of UE. Their members are listed in Footnotes 1 and 3, above, respectively. They intervened in this matter to protect their interest, which is the continued availability of a safe and adequate supply of electricity at just and reasonable rates. The other intervenor KCPL, is also a traditional regulated utility providing electricity at retail in Missouri.

The Staff of the Commission traditionally appears as a party in Commission proceedings and is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]"¹¹

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"¹²

The Proposed Transaction:

UE seeks leave to transfer its Illinois retail electric and natural gas operations, including customers and the T&D (transmission and distribution) facilities serving them, to its regulated affiliate CIPS at \$138 million net book value. UE's Illinois gas and electric service areas are located just east of St. Louis in an area referred to as "Metro East." The proposed transfer includes UE's certificates, permits, licenses, and franchises, its transmission and distribution plant, its retail electric and natural gas businesses, including its customers, and various associated maintenance and labor agreements and related liabilities. Some of UE's electric service assets in Illinois, however, including generating plants located in Venice, Illinois, and Keokuk, Iowa, are excluded from the proposed transfer. The transfer, if approved and effected, is irreversible for all practical purposes.

¹¹ Section 386.071.

¹² Sections 386.700 and 386.710.

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The transfer of UE's Metro East electric service area to CIPS would reduce UE's load requirement by 510 MWs of firm load. By this reduction, 597 MWs of additional capacity would become available for UE's Missouri customers.¹³ Because it is not possible to specify that any particular generating plant is serving the Metro East load, that load is considered to use about 6-percent of the output of each of UE's plants, wherever located. Most of UE's generation assets are relatively low-cost, coal-fired, base-load plants, although there are also nuclear, hydroelectric, and natural gas-fired combustion turbine generation (CTGs) assets in UE's fleet, for a total capacity of 8,437 MWs. The proposed transfer, if approved, would make an additional 6-percent slice of the output of each of these plants available to UE's Missouri customers. This 6-percent slice has a book value of \$223 million.

With the availability of an additional 6-percent slice of UE's generation output, an equivalent 6-percent slice of the associated operating costs, administrative costs, and contingent liabilities would necessarily become the responsibility of UE's Missouri ratepayers. The transfer would not affect the capital structure of either UE or CIPS, nor would it affect UE's return on equity or the tax revenues of any political subdivision. The transfer would make UE a Missouri-only utility, no longer subject to the I.C.C.

The compensation for the transfer is structured in this way: CIPS will give UE a promissory note for approximately \$69 million in exchange for half of the Metro East assets. CIPS will make payments, including interest at a market rate, to UE to retire the note. UE will transfer the remaining half of the Metro East assets to its parent, Ameren, as an "in-kind" dividend. UE will then transfer the assets to CIPS as a capital contribution. Ameren has structured the transaction in this way so that CIPS' and UE's capital structures and UE's return on equity will not be significantly affected.

The transfer proposed here has been before this Commission before, in differing configurations, and has been approved. It has not occurred because it has never been approved simultaneously by all three regulating bodies: this Commission, the I.C.C. and the FERC. The record shows that Staff generally favors the transfer, but is opposed to the present configuration. The I.C.C. has approved the electric part of the present proposal and is expected to approve the natural gas part soon. FERC has also approved the transfer.

CIPS:

CIPS is a regulated electric and gas utility that provides services at retail to the public in Illinois. CIPS has approximately 320,000 electric customers and 170,000 gas customers. Because Illinois has deregulated utilities, CIPS is a "pipes and wires" company that owns no generation assets of its own and must purchase electricity to serve its ratepayers. That electricity is provided by AEM, an unregulated UE subsidiary, under a Power Supply Agreement that will expire on December 31, 2006. The electricity sold by AEM to CIPS is produced by Genco, which owns the generating assets that formerly belonged to CIPS and sells electricity, through AEM,

¹³ Calculated using a certain reserve figure that is Highly Confidential.

both to CIPS and on the wholesale market. Genco owns fossil fuel plants with a total capacity of 3,231 MWs and CTGs with a total capacity of 926 MWs.

UE, CIPS, and Genco are operated as a "single control area" under a Joint Dispatch Agreement (JDA) approved by both this Commission and the I.C.C. Under the JDA, capacity – available energy – is dispatched to serve load without regard to whose capacity or whose load is involved. However, inter-company transfers of energy are tracked and billed at incremental cost. "Incremental cost" is a costing methodology that measures only the additional costs incurred to produce the specified increment of service; necessarily, incremental cost excludes all fixed costs. There are no transmission charges applied to such energy transfers under the JDA. Excess capacity is sold off-system at whatever price the market will bear. Under the JDA, profits from such sales are shared on the basis of proportionate native load rather than on the basis of proportionate generation. Under this arrangement, AEG receives a larger share of the off-system sales profits than it would if the profits were shared on the basis of generation. The proposed transfer, by transferring load from UE to CIPS, would also result in an increase in AEG's share of the profits from off-system sales.

Generation-related Issues:

The proposed transfer would make 597 MWs of additional, existing generating capacity available to serve the present and future needs of UE's Missouri load. UE estimates that the capacity increase provided by the proposed transfer would permit it to avoid new construction that would cost ratepayers about \$7.7 million annually. Ratepayers would realize additional savings because the cost per megawatt-hour (MWh) of the output of UE's existing plants is significantly lower than the cost per MWh of either purchased power or power produced by gas-fired CTGs.

1. UE's Need for Additional Capacity:

Public Counsel's expert economic witness Ryan Kind testified that UE does not even need additional capacity at the present. However, Staff's expert economist, Dr. Michael Proctor, disagreed with Kind and testified that his calculations were "incorrect" and "overstate the capacity surplus of AmerenUE." The specific figures and calculations produced by the expert witnesses were designated Highly Confidential and cannot be set out here. Nonetheless, a review of the figures produced by Kind shows that they contradict his testimony. Kind calculated a deficit of several hundred MWs per year for each year from 2004 through 2007 if the proposed transfer were not approved, even assuming that AEG transfers to UE some 550 MWs of CTGs at Kinmundy and Pinckneyville.¹⁴ Proctor testified that UE will need additional capacity by 2006 even if the Metro East transfer is approved. His analysis shows the greatest deficit figures of all, three or more times the level calculated by Kind. All three expert witnesses agree, and the Commission finds, that UE is presently in need of several hundred MWs of additional capacity.¹⁵

¹⁴ The schedule in question, No. 2 to Kind's Rebuttal Testimony, is marked Highly Confidential and so the specific figures are not set out here.

¹⁵ The third expert witness referred to was Richard Voytas, Jr.

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A finding that UE needs additional capacity is not the same as a finding that it needs the amount of capacity that the Metro East transfer would provide. Economist Kind testified that UE does not need all of the 597 MWs of additional capacity right now. Dr. Proctor also testified that UE could phase new CTGs in over a three-year period, a position that is at odds with his calculation of UE's capacity needs at UE's chosen reserve margin figure. The Commission will return to this point later in conjunction with its discussion of the JDA.

2. UE's Reserve Margin:

The amount of capacity UE needs turns on the size of its capacity reserve margin. The record shows that the Ameren system has enough capacity now to meet its load and maintain a reserve. However, as its load grows, more capacity will be necessary. UE operates with a certain percentage of capacity in excess of that actually needed to meet its load – the specific percentage is Highly Confidential.¹⁶ This reserve margin is necessary because a particular generating plant and its output might unexpectedly become unavailable at any time; thus, a reserve is essential to avoid service interruptions or a forced purchase of power at unfavorable prices. The number of MWs that UE needs necessarily varies with the reserve level selected. Economist Kind testified that UE's chosen reserve percentage is too high and that the cost of the alternative considered by UE, that of building CTGs, would be lower if UE's reserve margin were smaller.¹⁷ However, the record shows that UE's selected reserve margin figure is within the range recommended by the Mid-America Interconnected Network (MAIN). The Commission is of the opinion that it is not sound public policy to urge an electric utility to reduce an otherwise reasonable reserve margin for reasons of economy. The Commission finds UE's reserve margin figure to be reasonable and accepts that it is the appropriate figure to use in resource planning to meet UE's present and future capacity needs. The Commission also notes Dr. Proctor's testimony that Kind's focus on UE's capacity need and reserve margin ignores the energy cost savings that the transfer would bestow on UE's Missouri customers.

3. The Least Cost Alternative Analysis:

UE calculated that the proposed transfer is the "least-cost alternative" by which to provide the necessary additional capacity. UE compared the proposed transfer to a single alternative scenario, in which it would instead immediately build sufficient new CTGs to provide an equivalent amount of additional capacity – these are the source of the avoided construction costs cited by UE as a benefit of the transfer. Public Counsel and Staff criticized UE's least cost analysis for several reasons, one being that it improperly inflated the cost of the CTG option by assuming that all of these units would be built immediately. The Commission will return to this point below in its discussion of the JDA.

UE's least-cost analysis showed that, with respect to providing additional generation capacity, the proposed transfer would save \$2.4 million to \$2.5 million annually over the alternative of constructing CTGs. UE's analyst, Richard Voytas,

¹⁶ More technically, "reserve margin" is the amount of unused and available generation when the system is at peak load, expressed as a percentage of total capacity.

¹⁷ Because less MWs would be needed and fewer CTGs would have to be built.

testified that the Metro East transfer's cost is estimated at \$418.4 million present value (\$43.1 million annually on a levelized annual cost basis) compared to an estimated \$429.4 million present value (\$45.5 million annually on a levelized annual cost basis) for adding 597 MWs of CTGs.¹⁸ Voytas calculated the cost difference between the two options using a test year analysis, which he then projected out over 25 years. Consequently, his analysis did not reflect how the test year values might actually vary over the course of 25 years. For example, one element included in Voytas' calculation was revenue derived from the sale of SO2 emission allowances. The record shows conclusively that the level of revenue Voytas used for the test year could not actually be sustained over 25 years because insufficient allowances are available. For this reason, Staff's witness Proctor suggested that the Commission should delay the transfer and require UE to redo its 25-year analysis as a true multi-year analysis.

Voytas used the 12 months ending December 31, 2002, as his test year. However, he used 2001 figures for revenue from the sale of SO2 emission allowances rather than the 2002 figures because he considered the former to be a more typical year. The 2001 figures were almost twice those of 2002. Kind testified for the Public Counsel that using the 2002 SO2 allowance sales figures would result in a higher revenue requirement for the Metro East transfer option and would reduce its purported benefits by more than half, to an annual figure of only \$1.7 million.

In its Application for Rehearing, Public Counsel also urged the Commission to make a further adjustment to the least cost analysis results relating to what Public Counsel claims is a negative tax impact relating to the annual SO2 adjustment. Public Counsel's contention in this regard is incorrect. The least cost analysis performed by the Company assumes that the Company will receive \$7 million more per year in revenues from SO2 allowance sales. As noted above, the Commission disagrees and has made the adjustment to disregard the \$7 million. If, however, the Company was to receive an additional \$7 million in SO2 revenues, those SO2 revenues would reduce the revenue requirement by a like amount – \$7 million – resulting in a net effect on net income of zero. The Commission therefore finds that there is no tax impact as Public Counsel alleges.

Voytas admitted that he overstated the cost of the CTG option by some \$800,000 by use of a 2-percent annual escalation factor for operations and maintenance (O&M) costs in that option that was not applied in the transfer option. Public Counsel asserted that Voytas also overstated the cost of the CTG option by pricing CTGs at \$471 per kilowatt (kW) where a more reasonable price would be \$450/kW. In fact, Kind testified that making only two adjustments to the analysis, namely, (1) the use of the 2002 SO2 allowance sales revenue figures rather than 2001 figures and (2) pricing CTGs at \$450/kW rather than \$471/kW, shows that the CTG option actually would cost about \$100,000 less than the Metro East transfer option.

First, the Commission generally agrees with UE that Voytas' projection of his test year analysis over 25 years was reasonable given the necessarily highly

¹⁸ The estimated cost of the CTG option used here, \$429.4 million present value, includes the \$12.3 million adjustment for likely revenues from off-system sales discussed below.

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speculative nature of predictions of how the test year values might change over that period. As UE explained, this position does not ignore the change of values over time but rather assumes that pressures in either direction will cancel out. With respect to the SO₂ allowance revenue figures, however, it was clearly incorrect to use the 2001 figures, however typical, where that level of sales cannot be sustained over the 25-year period. For this reason, the Commission accepts Public Counsel's estimate, based on the 2002 sales figures, and finds that the value of the generation-related benefit of the Metro East transfer must be reduced from \$2.4 million to \$1.7 million on an annual basis to reflect the use of the 2002 SO₂ sales revenue figures. The Commission notes that the record does not show what level of SO₂ sales could be sustained over 25 years; Public Counsel's figure is accepted as the correct figure for the test year.

The Commission does not agree with Public Counsel, however, that UE erred by pricing CTGs at \$471/kW. Staff witness Proctor testified that UE's \$471/kW figure was based on the average cost of a mix of larger, less expensive CTGs and smaller, more-flexible-but-more expensive CTGs. The record shows that such a mix of units is required in order to achieve the greatest possible operating flexibility and efficiency and that UE would build such a mix if the proposed transfer is not approved. For this reason, the Commission finds that the \$471/kW figure used by UE was appropriate.

Another area of disagreement involved the degree to which revenues from the sale of excess capacity could be expected to offset the cost of the CTG option. Staff asserted that Voytas used inappropriate assumptions concerning the total margin on sales of excess capacity. Voytas' "mark to market"¹⁹ analysis assumed that the CTGs would operate whenever the incremental cost of CTG generation was below the current spot market price of electricity; but Voytas also assumed that UE would sell only 50-percent of the power so generated, thereby reducing the level of profits from off-system sales available to offset costs. Voytas testified that he made this reduction to address transmission constraints, depth of market, and the use of CTG generation to serve native load. Staff witness Proctor criticized the 50-percent reduction as "arbitrary" and testified that UE should have performed a detailed analysis to determine the actual effect of these three factors on off-system sales revenue rather than simply applying an arbitrary reduction factor unsupported by any empirical data. For example, Proctor testified that if UE actually needs the output of the CTGs to serve native load only 5-percent of the time, then off-system sales should be rated at \$23.3 million in present value rather than \$12.3 million, with the result that the CTG option would cost only \$418.4 million, exactly the cost of the Metro East transfer option as estimated by Voytas.

Voytas, however, testified that Proctor's 5-percent figure was unreasonable because it assumed that virtually all of the output of the CTGs would be available for sale off-system over a 25-year period. In 2003, Voytas testified, UE used 49.4-percent of the output of its newest CTGs at Peno Creek to serve native load. Voytas further testified that UE's Asset Mix Optimization (AMO) studies showed that

¹⁹ A "mark to market" analysis compares forward electric price curves to the variable cost of operating the CTGs for every hour of the analysis period.

between 35-percent to 80-percent of the output of the CTGs would be available for off-system sales, depending on the scenario. Voytas testified that the 50-percent reduction figure he used was therefore a "reasonable and prudent" choice in the middle of the range predicted by the AMO studies. Based on UE's actual experience with the Peno Creek CTGs and the results of UE's AMO studies, the Commission finds that the 50-percent figure used by Voytas was not arbitrary and was a reasonable estimate of the output likely to be available for off-system sales. Therefore, the Commission finds that the appropriate estimated revenue level for off-system sales under the CTG option is \$12.3 million.

The Commission agrees with Public Counsel that it is appropriate to reduce the cost of the CTG option by the amount of expected off-system sales revenue, thereby reducing the cost from \$441.7 million to \$429.4 million, only about \$11 million higher than the present value cost of the Metro East transfer option at \$418.4 million. Proctor characterized this \$11 million difference between the two options as "extremely small," given the scale of the figures involved, so that, "from a purely economic perspective, the expected costs of the two alternatives are almost identical."

Both Kind and Proctor testified that not all of the 597 MWs of additional capacity that the transfer would provide are needed immediately by UE. In that case, the excess production should be available for sale and the proceeds should be deducted from the cost of the Metro East transfer option just as the expected off-system sales proceeds are deducted from the cost of the CTG option. However, any excess capacity released by the Metro East transfer would not be available for sale due to the JDA and the Power Supply Agreement referred to above. Under those agreements, the excess capacity produced by the Metro East transfer would be used to meet CIPS' native load, including the Metro East load transferred away by UE.

4. RFPs and the Joppa Plant:

Kind testified that Voytas' Least Cost Analysis was improper because it compared the cost of the Metro East transfer option to only a single alternative. Kind suggested that UE should have used RFPs – Requests For Proposals – to identify other possible options. Kind also testified that UE had ignored the approximately 400 MWs received annually from a particularly efficient – and thus low-cost – coal-fired plant at Joppa, Illinois, owned by EEInc. Ameren owns a controlling interest in EEInc. and, according to Kind, should therefore be able to dictate that those 400 MWs remain available.

Both the Commission's Staff and UE joined in the view, which the Commission accepts, that RFPs are not appropriate for long-term resource planning. Dr. Proctor testified that the appropriate way to meet long-term capacity needs is to build a new plant. RFPs, by contrast, are a way to obtain short-term power supplies.

The Joppa Plant presents a different issue. UE owns 40-percent of EEInc. and receives 40-percent of the Joppa Plant's output under a contract that will expire at the end of December 2005. UE offered testimony that that contract will not be renewed because it is unprofitable for EEInc. to sell that power to UE at the price mandated by this Commission's Affiliate Transaction Rules, a price that is below market price. UE's share of EEInc. is an investment owned by UE's shareholders

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and UE has an obligation to maximize the return on that investment. The record shows that EEInc. no longer bids on UE's RFPs.

The Commission finds that the record shows that the output of the Joppa Plant will not be available after the end of 2005. Whether it *should* be available is a different question, one that is outside the scope of this case. Proctor disagreed with Kind regarding the EEInc. contract. Proctor testified that, in UE's long-range resource plan, the termination of the EEInc. contract is linked not to the Metro East transfer, but rather to the addition of 330 MWs of CTGs at Venice, Illinois. The Venice CTGs will replace a coal-fired plant at that location that UE retired. Proctor specifically disagreed with Kind's conclusion that the capacity freed by the transfer would be unnecessary if the EEInc. contract were renewed and stated that renewal of that contract would permit UE to delay the addition of new capacity by only a year. Proctor stated that renewal of the EEInc. contract should not be a condition for approval of the Metro East transfer.

The Commission finds Proctor's testimony on this point to be more credible than Kind's. The record shows that the Joppa output will not be available after the end of 2005 and that UE is replacing that capacity with CTGs at Venice. Thus, as Proctor testified, the proposed Metro East transfer is unrelated to the Joppa contract. A simple count of the MWs involved supports Proctor's conclusion that UE would soon need additional capacity even if the Joppa contract were renewed.

5. The Joint Dispatch Agreement:

As has been stated above, UE and CIPS are operated as a single control area under a JDA. The JDA provides that profits from off-system sales are distributed to the participants on the basis of comparative load rather than comparative generation. This arrangement favors CIPS rather than UE because CIPS has a large load and no generation. The transfer of the Metro East load from UE to CIPS will exacerbate this inequity. Although UE doesn't believe the JDA needs to be modified in this respect, UE has stated that it will obtain a modification of the JDA to distribute profits from off-system sales based on generation rather than load if necessary to gain approval of this transfer. This amendment would provide financial benefits to UE of at least \$7 million annually, and perhaps as much as \$24 million annually.

The JDA also provides for the transfer of energy between the participating entities at incremental cost. As noted above, the effect of the JDA and the Power Supply Agreement in the event that the Metro East transfer is carried out would be to require that any power produced by UE that is not needed to meet its load would be available to CIPS at incremental cost to meet its load requirements. In other words, the Metro East ratepayers would continue to be served by the same 6-percent slice of UE's generation that serves them now, but they would no longer pay any portion of the fixed costs of that generation. At present, the Metro East ratepayers pay approximately 6-percent of UE's generation-related fixed costs. Fixed costs are those that do not vary with the amount of production.

Transmission-related Issues:

The proposed transfer includes certain transmission assets owned by UE, constituting 14.33-percent of all of UE's transmission plant. These facilities

connect the generating plants at Venice, Illinois (75 MWs, soon to be increased by 330 MWs to 405 MWs), Pinckneyville, Illinois (330 MWs), Joppa, Illinois (405 MWs), and Keokuk, Iowa (134 MWs), to the Missouri grid. These transmission assets presently serve UE's Missouri customers and will continue to be necessary to serve UE's Missouri customers. If the proposed transfer is approved, title to these transmission assets will be transferred to CIPS.

UE performed an analysis of the financial impact on Missouri ratepayers of the transfer of the Metro East transmission assets. That analysis showed that the transfer would confer a net annual benefit on Missouri ratepayers of \$0.385 million, increasing to \$1.503 million after movement to the Midwest Independent System Operator (MISO) due to the reduction of transmission revenues by 25-percent. Proctor testified that UE made certain errors in its analysis that caused it to significantly understate the net annual benefit of the transfer to Missouri ratepayers. Specifically, Proctor stated that UE had failed to include the further allocation between its Missouri retail customers and its wholesale customers, an error that resulted in an overstatement of the transmission cost of service for Missouri retail customers of about \$1.4 million. Proctor also stated that UE made an additional rounding error that resulted in the understatement of the benefits of the transfer by \$271,000 annually. Finally, Proctor stated that using the traditional 12-coincident-peak allocation factor rather than the 4-coincident-peak allocation factor adopted by UE for its analysis results in additional benefits of \$100,000 to \$200,000 annually. Proctor concluded that the net annual benefit of the transfer would actually be \$2.033 million, increasing to \$3.089 million after movement to MISO. No party contested Proctor's conclusions and the Commission accepts Dr. Proctor's figures.

Under the JDA, as noted previously, UE and CIPS are operated as a single control area. The transmission assets in question play a fundamental role in the single control area architecture because they are the conduit over which power is exchanged by UE and CIPS. The purpose of a control area is to dispatch and regulate generation. Every control area is connected at various points with adjacent control areas; these points of interchange are metered on a real-time basis. This metering provides instantaneous information to the control area operator so that generation output can be regulated to maintain balance with native load and net scheduled interchange, that is, net imports or exports of power.

Because of the single control area operating design, there are now no transmission charges for power transferred between UE and AEG/CIPS. However, Staff fears that CIPS may seek to recoup lost revenues by imposing such transmission charges if the JDA is modified as has been suggested in this proceeding. Staff witness Proctor described a "worst-case scenario" in which Missouri ratepayers would have to pay \$13.8 million annually to access the generation from Venice, Pinckneyville, Joppa, and Keokuk over CIPS' transmission facilities. The Commission notes that Proctor himself rated the worst-case scenario as only 20-percent to 25-percent likely to occur. If it did occur, the impact would be an additional \$0.80 per UE customer per year. UE has transferred functional control of these transmission assets to the MISO via its relationship with GridAmerica.²⁰

²⁰ Approved by this Commission in Case No. EO-2003-0271.

Issues Related to the Decommissioning Trust Fund:

One of UE's generating stations, in Callaway County, Missouri, is a nuclear reactor. A large sum, some \$515,339,000 in 2002 dollars, will eventually be needed to decommission that plant at the end of its useful life. UE's electric customers, including the 62,000 retail electric customers in the Metro East area, contribute toward that amount through the rates that they pay. The collected amounts are held in the Callaway Decommissioning Trust Fund, which presently has an estimated after-tax market value of \$191,220,140.59.

The Commission redetermines the eventual cost of decommissioning, and the necessary contribution of the ratepayers to meet that cost, every three years in a proceeding referred to as the triennial review. The estimated cost of decommissioning is allocated to UE's three jurisdictions using 12-month coincident peak demand allocation factors. The three jurisdictions are Missouri Retail, Illinois Retail and Wholesale; Missouri Retail is allocated responsibility for 91.27-percent of the estimated cost of decommissioning. The start of the next triennial review, on September 1, 2005, was about 15 months away at the time of hearing in April 2004. Decommissioning costs, according to UE's 10-K filed with the SEC, will increase by 3.5-percent annually through 2033. The Commission's estimate of total decommissioning costs has increased at each triennial review.

If the Metro East transfer is approved, there will only be two jurisdictions, Missouri Retail and Wholesale. The allocation factor applicable to Missouri Retail will increase to 98.01-percent and Missouri ratepayers will become responsible for approximately \$22.0 million in decommissioning costs that are presently the responsibility of the Illinois Retail ratepayers in the Metro East area.²¹ As an offset to this amount, UE will transfer 98-percent – \$13.8 million in after tax value – of the funds in the Illinois subaccount of the Decommissioning Trust Fund to the Missouri subaccount. Decommissioning costs will be allocated 98-percent to Missouri Retail and 2-percent to Wholesale, which is how the energy will be used after the transfer. Decommissioning costs were reallocated in this manner when UE sold its Iowa retail electric service area in 1992 and Missouri ratepayers became responsible for the portion of the decommissioning costs that had been the responsibility of UE's Iowa ratepayers.

Until the next triennial review, UE would contribute \$6,214,184 annually to the Decommissioning Trust Fund as established by this Commission at the last triennial review. This amount, equal to 0.37-percent of UE's annual Missouri operating expenses, excludes the \$272,554 collected annually for this purpose from the Metro East ratepayers in Illinois. UE has offered a "Zone of Reasonableness" analysis that suggests that there is no need for the \$272,554 contribution at decommissioning inflation rates up to 3.854-percent; in other words, that the annual contribution of \$6.2 million will result in adequate funding even if that target

²¹ Calculated as follows: \$536,000,000 (total decommissioning cost in 2003 dollars) x 0.9801 (Missouri share after the transfer) - \$536,000,000 x 0.9127 (Missouri share before the transfer) = \$36,126,000 - \$13,526,000 (current market value of the Illinois sub-account) = \$22,600,000.

is inflated annually by the designated percentage. UE's witness Kevin Redhage testified that the present decommissioning inflation rate is 3.472-percent, calculated using three weighted factors (labor, 65-percent; energy, 13-percent; and burial cost, 22-percent). Nonetheless, UE has offered to make that contribution itself until the next triennial review if it is necessary to obtain approval of the proposed transfer.

Costs and Liabilities:

Both Staff and the Public Counsel argued that the proposed transfer would be detrimental to the interests of Missouri ratepayers because of the treatment of certain costs and liabilities under the agreement between UE and CIPS. These include items arising prior to the transfer, such as debt on the property transferred to Illinois, workers compensation and other employee-related claims, personal injury claims, products liabilities, common general liabilities, under-reserved claims, and environmental liabilities. Many of these categories include items both known and unknown. Another consideration is items arising after the transfer, such as capital investments necessary in the future to comply with increasingly stringent environmental regulations. With respect to the items arising pre-transfer, Staff and Public Counsel contend that the UE's proposal will not leave CIPS with its fair share of the known items and will release the Metro East ratepayers from their fair share of the unknown items. With respect to future capital costs made necessary by environmental regulations, Staff and Public Counsel contend that UE's least cost analysis is seriously flawed because it does not include the likely rate impact of these costs. The net impact of the transfer will be to increase the existing exposure of Missouri's ratepayers on these liabilities by 6-percent.

1. Pre-transfer Costs and Liabilities:

The agreement between UE and CIPS provides for the transfer of certain liabilities to CIPS. These include (i) balance sheet liabilities relating to UE's Illinois retail operations; (ii) trade payables relating to UE's Illinois retail operations; (iii) liabilities and obligations on contracts relating to UE's Illinois retail operations, insofar as they arise after the closing date of the transfer; (iv) litigation-related liabilities relating to UE's Illinois retail operations, insofar as they arise after the closing date of the transfer; (v) environmental liabilities relating to UE's Illinois retail operations, insofar as they arise after the closing date of the transfer, specifically including (1) the Alton Manufactured Gas site and (2) any pre-closing environmental liabilities relating to UE's Illinois retail operations insofar as they are covered by UE's existing environmental adjustment clause riders approved by the I.C.C.; (vi) accounts payable on natural gas purchased for resale and not yet paid; (vii) accrued payroll and employee vacation liability; (viii) liabilities relating to customers of UE's Illinois retail operations, whether arising pre-closing or post-closing; and (ix) franchise fees, gross receipts taxes and utility taxes relating to UE's Illinois retail operations, whether arising pre-closing or post-closing.

The agreement provides that any liabilities not expressly noted as transferring to CIPS will remain with UE, including (i) all pre-closing liabilities relating to UE's Illinois retail operations; (ii) all employee liabilities relating to UE's Illinois retail operations, whenever asserted, arising prior to closing, including workers compensation, wage and hour, and the like; (iii) liabilities due to litigation relating to UE's

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Illinois retail operations, whether pending at closing or filed after closing but based on pre-closing events; (iv) products liabilities, safety liabilities and environmental liabilities based in whole or in part on pre-closing events or conditions, including claims over services, personal injury, property damage, environmental claims, hazardous materials, employee health and safety, and violation of applicable laws; (v) taxes, except as expressly assumed by CIPS; and (vi) all liabilities relating to assets retained by UE, including generation-related environmental liabilities.

The agreement between UE and CIPS provides that almost all of the existing general corporate liabilities will stay with UE. "General corporate liabilities" are those which cannot be assigned directly to a particular line of business. There are 22 liability accounts on UE's balance sheet and the record shows how each balance sheet account will be treated if the transfer occurs. The Unrecovered Purchased Gas Costs account is not affected by the transfer and will stay with UE. Reserves for existing lawsuits, asbestos claims, and worker's compensation claims will stay with UE. These amounts have already been expensed. Environmental liabilities with a reserve on the books will stay with UE, except for the Alton Manufactured Gas Site, which will be transferred to CIPS. The Asset Retirement Obligation Liability account, which is offset by a balance sheet asset, will stay with UE, as will the corresponding asset. These accounts will have no cost of service impact going forward.

Accounts Payable will stay with UE, but these amounts are already expensed and will thus have no impact on rates. Invoices from Mississippi River Transmission for natural gas used in Illinois will transfer to CIPS. The latter amounts have never been included in Missouri's cost of service. Charges owed to Ameren Services (AMS) will move to CIPS post-closing. These amounts have already been expensed and will have no impact on rates. Illinois customer deposits will transfer to CIPS, as will Illinois customer advances in aid of construction.

Interest on long-term debt will stay with UE; there is no cost of service impact because the interest is "below the line." Short-term debt will also stay with UE. The interest expense is "below the line" and thus excluded from cost of service. Also, short-term debt is not included in calculating UE's return on equity. Public Counsel's Application for Rehearing takes issue with the Commission's findings above related to UE's debt. Public Counsel's contentions are incorrect in that Public Counsel confuses the effect of debt on UE's capital structure (the capital structure does impact rates) versus the effect of interest paid on debt, which does not affect return on rate base or cost of service. Indeed, the record shows that by retaining this debt, which is lower cost than equity financing, UE's overall cost of capital is reduced and thus its cost of service is reduced. The Dividends Declared account will stay with UE. This item is also "below the line" and will have no cost of service impact. Taxes applicable to the transferred assets will be transferred to CIPS. Taxes collected by UE from its employees and customers will be paid over to the various taxing authorities. A proportionate amount of Accumulated Deferred Income Taxes will be transferred to CIPS.

Liability for Employee Wages Payable for transferred employees will transfer to CIPS. Accrued vacation liability for transferred employees will transfer to CIPS. Other items in the Miscellaneous Current and Accrued Liabilities account will stay

with UE, but have already been expensed. Pre-closing pension liability will not be transferred. Post-closing pension liability for transferred employees will transfer to CIPS. Current pension liability has already been expensed. Current liabilities for Post Retirement Benefits have already been collected in rates and will stay with UE.

Post-closing liabilities will transfer to CIPS. Derivative Instrument Liability under Financial Accounting Standards (FAS) 133 is not applicable to the businesses being transferred, and so will stay with UE. Accumulated Nuclear Decommissioning will not be transferred. The Other Regulatory Liabilities account is the other side of the FAS 109 balance sheet entry. It is offset by entries in the Accumulated Deferred Income Taxes account already mentioned. A proportionate amount of this account is being transferred to CIPS. It has no cost of service impact. A proportionate amount of Accumulated Deferred Investment Tax Credits is being transferred to CIPS, as is a proportionate amount of the Accumulated Deferred Income Taxes Accelerated Amortization Property, the Accumulated Deferred Income Taxes Other Property, and the Accumulated Deferred Income Taxes Other accounts.

Staff contends that the compensation that UE would receive under the agreement is thus inadequate, because it represents only the net book value of the transferred assets and includes nothing additional for the retained liabilities. The record shows that the assets being transferred are security for certain bonds that UE will retain. Missouri ratepayers, therefore, will be responsible for paying the debt on the assets being transferred.

UE will retain all pre-transfer environmental liabilities except for the Alton Manufactured Gas Plant and any other such liabilities covered by UE's existing riders. UE dismisses these liabilities as "speculative" because their eventual magnitude cannot now be known. Staff asserts that Missouri ratepayers should not pay for the 6-percent of the environmental liabilities that arose when that share of the generation benefited Illinois ratepayers. Staff argues that 6-percent of these liabilities should either stay with Illinois or that UE should be adequately compensated for assuming them. Some 49 lawsuits regarding injuries due to asbestos exposure at UE premises have already been filed, seeking a total of \$2,450,000 in damages outside of legal fees and costs. UE will retain these liabilities under the transfer agreement. When CIPS and CILCO transferred generation assets to Genco and AERG, they agreed to indemnify them for any pre-transfer, asbestos-related claims. The agreement between UE and CIPS does not include any such indemnity clause. With respect to the asbestos claims, the record shows that, while 49 are pending, UE has obtained dismissal of 50 and has settled 22 more. UE has established a reserve of \$30 million for such claims and the potential exposure of Missouri ratepayers if the transfer is approved is 6-percent of any shortfall.

UE must fund the cleanup of hazardous waste sites regardless of fault. One such site is the former Sauget Generating Station in Illinois. While UE's estimated share of the Sauget remediation costs is proprietary and cannot be set out here, the likely impact on Missouri ratepayers is less than \$1 million. However, the other company liable for the Sauget cleanup, Solutia – formerly known as Monsanto – is in bankruptcy and may not be able to pay its share of the Sauget remediation costs. UE's 10-K suggests that the Sauget costs could be as much as \$26 million

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if Solutia makes no contribution. The impact of that amount on Missouri ratepayers would be \$1.56 million by 2010.

The agreement between UE and CIPS specifically transfers all liability for remediation at the Alton Manufactured Gas Plant to CIPS. The I.C.C. allows utilities to recover remediation costs in rates from Illinois ratepayers and that remediation is in rates in the Metro East service area. The current amount deferred for UE, net of recoveries, is \$1 million.

2. Future Environmental-related Capital Costs:

One criticism that Public Counsel made of Voytas' least cost analysis was that his projection of test year values over 25 years inappropriately assumed that the cost of complying with environmental regulations would not change over that period. UE's own 10-K, a form filed with the S.E.C., however, projects environment-related capital investments of \$863 million to \$1,163 million over the next 15 years, an additional 6-percent of which will become the responsibility of Missouri ratepayers if the Metro East transfer is approved. Assuming a 10-percent Return on Equity (ROE), these capital investments will cost ratepayers between \$5.1 million and \$7.0 million annually due to the increased rate base on which UE would be earning a return. Although the figures in the 10-K are estimates, the Missouri Supreme Court has said that the PSC should use estimates where actual figures are unavailable.²² These projected expenditures are not speculative; they are likely enough that UE included them in its 10-K for consideration by investors.

The proposed transfer will make available for UE's Missouri customers an additional 6-percent slice UE's existing generating capacity. Necessarily, with this extra capacity will come responsibility for an additional 6-percent of any associated future environmental liabilities. As noted above, Public Counsel calculated this additional burden at between \$5.1 million and \$7 million annually. For this reason, Kind testified that these coal-fired plants are not "low-cost" plants, as UE claims, but increasingly high-cost plants as increased environmental regulation takes hold in the near future.

An associated matter has to do with SO₂ emission allowances, already discussed above. SO₂ is a pollutant released into the air by burning coal. The allowances, each of which authorizes the release of one ton of pollutants, are necessary for utilities with coal-fired plants. The Environmental Protection Agency allocates a number of allowances to each utility each year. UE aggressively markets its SO₂ allowances to other utilities, leading Staff and Public Counsel to fear that UE will find itself without the necessary number of allowances. In that case, the company would have to install expensive pollution-control equipment at its plants sooner than would otherwise be necessary and, should the Metro East transfer be approved, Missouri ratepayers would have to pay an additional 6-percent of the costs of such a debacle. Staff's witness Campbell testified that the costs of emission-control systems would run into the hundreds of millions of dollars.

²² *St. ex rel. Martigney Creek Sewer Co. v. Public Service Commission*, 537 S.W.2d 388, 396 (Mo. banc 1976).

The record shows that UE has one of the largest SO₂ allowance banks in the country. If environmental regulations don't change and UE makes no further sales, it has enough allowances on hand now to last through 2033. UE was allotted 1.6 million Phase I allowances and it has sold only 474,829, which is less than half of the total. The forecasts in UE's 10-K are possible levels of future capital expenditures for environmental purposes. It is by no means certain that these expenditures will ever actually be made. In any event, UE's Missouri ratepayers will certainly bear the costs of over 90-percent of such expenditures as are actually made. What is at issue is an additional 6-percent share, or an annual increase of \$6.54 to each UE customer if the capital expenditures are actually as high as Public Counsel predicts, at a 10-percent ROE.

Natural Gas Issues:

Staff witness Dave Sommerer suggested that there are two detriments with respect to the proposed transfer of the Alton natural gas retail service area. First, that the small Fisk/Lutesville service area in Missouri might then be unable to obtain transportation on as good terms as it has heretofore enjoyed. Specifically, the Missouri Fisk/Lutesville customers will lose the benefit of including their supply contracts in the much larger Alton gas supply contracts. Second, that gas-related costs at the Venice and Meramec power plants might increase due to the loss of a beneficial "piggybacking" relationship with the Alton natural gas service area. The Alton and Fisk/Lutesville Local Distribution Companies (LDCs) are served by a single firm transportation contract that will expire on Oct. 31, 2006. At that time, AEFS – another Ameren subsidiary – will negotiate a new contract, which UE's witness Massman testified will probably be just as good. Sommerer, however, testified that, if the transfer is approved, the power plants will replace firm, no-notice contracts for peak summer demand with uncertain, stand-alone supply and transportation arrangements relying on the volatile spot market. Massman insisted that the gas supply to the Venice and Meramec plants would not become either less certain or more costly because of the proposed transfer. The plants' needs were always subordinate to those of the Alton LDC. The plants were charged the market price for transportation and can thus still obtain it at that price; the plants used the arrangement rarely; Alton allocated the highest-priced gas to the plants each month; and the plants can still obtain storage from the transporter just as Alton did.

Dave Sommerer testified for Staff that the "worst-case scenario" impact for Fisk/Lutesville would be a \$10,000 annual cost increase, equating to a \$0.50 per month increase for the average customer. UE's witness Massman testified that neither asserted detriment is plausible in his opinion. Massman testified that the impact of the worst-case scenario with respect to the Venice and Meramec power plants would be an *annual* increase of \$0.084 to the electric bill of UE's average Missouri customer. Based on the record, the Commission finds that the asserted detriments are not likely to occur. If they do occur, their impact would be minimal. Sommerer testified that the worst-case outcomes might occur, while Massman, who actually manages these matters for UE, insisted that they were unlikely. The Commission finds Massman's testimony to be the more credible. The record shows, and the Commission finds, that the financial impact of even the worst-case scenarios would be very small.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The record shows that UE is in the business of owning, operating, controlling, and managing electric plant and natural gas plant for the purpose of selling electricity and natural gas to others. UE is therefore both an electric corporation and a gas corporation as defined in Section 386.020, and is a public utility as defined in that section, subject to regulation by this Commission under Chapters 386 and 393, RSMo.

UE proposes to sell to its affiliate, CIPS, its retail natural gas and electric operations in Illinois, including the customers and the transmission and distribution facilities that serve them. None of the property is located in Missouri, but some of it, particularly certain electric transmission facilities, directly serves UE's Missouri customers by transmitting electricity to them from UE's Illinois and Iowa power plants. Some of the other assets, such as the natural gas LDC in Alton, Illinois, indirectly impact UE's Missouri gas and electric operations. The effect of the transaction will be to reduce UE's native load, thereby making a larger percentage of the output of its existing power plants available to serve its remaining customers, all of whom will be located in Missouri.

Section 393.190.1 provides, in pertinent part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public * * * without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. * * * Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

The cited statute does not make any distinction as to the location of the property in question, whether in Missouri or elsewhere. Rather, it makes a distinction that turns on whether or not the property in question is "necessary or useful" to the utility

in the performance of its duties to the public. The record shows that all of the property in question is “necessary and useful” to UE in serving its natural gas and electric retail customers. Therefore, the Missouri Public Service Commission finds that it has jurisdiction over the proposed transfer pursuant to Section 393.190.1.

The Affiliate Transaction Rule:

UE seeks a waiver of the Commission's electric and gas affiliate transaction rules, 4 CSR 240-20.015 and 4 CSR 250-40.015, to the extent necessary to authorize the Metro East transfer. However, UE contends that a waiver is not necessary in the circumstances presented by this case because the transfer is not within the scope of those rules. The rules are designed to protect ratepayers from a transaction that is not at arms-length and which may thus result in exorbitant prices being imposed on ratepayers.²³

Staff and OPC contend that it is not in the best interests of UE's regulated customers to acquire power plants with pre-existing environmental liabilities. And, for this reason, they argue that the proposed compensation is not prudent, adequate, nor reasonable. They assert that this is exactly the sort of transaction to which the affiliate transaction rules were meant to apply. They argue that the present transaction is within the affiliate transaction rules because it involves the regulated entity (UE), its unregulated parent (Ameren) and a regulated affiliate (CIPS).

The Commission has authority to “inquire as to, and prescribe the apportionment of, capital, earnings, debts and expenses” between the regulated entity and its parent and affiliates.²⁴ In utility regulation, “the dominant thought and purpose of the policy is the protection of the public while the protection given the utility is merely incidental.”²⁵ The purpose of the affiliate transaction rules is to prevent cross-subsidization, in which a conglomerate including a regulated entity seeks to shift the costs of its unregulated activities to its regulated customers. The Commission agrees with Staff and Public Counsel that the affiliate transaction rules necessarily apply to the Metro East transfer, involving as it does UE, its parent and its affiliates.

UE seeks a waiver of Commission Rules 4 CSR 240-20.015 and 4 CSR 250-40.015. UE points out that, under 015(10)(A) (the two rules are identical in this respect), there are two ways to obtain a waiver, and only the second of these – (10)(A)2 – includes the “best interests of the regulated customers” standard cited by Staff and Public Counsel. The first way – (10)(A)1 – simply requires a written application to the Commission. The Commission agrees that UE has correctly analyzed the regulations and its Application constitutes the required written application. The Commission may grant the written application for good cause shown. In the present case, “good cause” would be a finding that the proposed transfer will confer a net benefit.

²³ *Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753 (Mo. banc 2003).

²⁴ Section 393.140(12).

²⁵ *De Paul Hosp. School of Nursing, Inc. v. Southwestern Bell Telephone Co.*, 539 S.W.2d 542, 548 (Mo. App., W.D. 1976).

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The Governing Standard under Section 393.190.1:

Section 393.190.1 does not contain a standard to guide the Commission in the exercise of its discretion; that standard is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest."²⁶ A court has said of Section 393.190.1, that "[t]he obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."²⁷ To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently.²⁸ None of these factors are at issue in the present case; neither is UE's ability to continue to provide adequate service to its customers.

The parties do not agree on the interpretation or application of the "not detrimental to the public" standard. UE asserts that the Commission must grant approval unless it finds the transfer would be detrimental to the public interest.²⁹ UE emphasizes the opinion of one court, quoted above, that the purpose of the statute is to ensure the continuation of adequate service to the public.³⁰ UE quotes prior decisions of this Commission to the effect that denial requires compelling evidence on the record that a public detriment is likely to occur.³¹ According to UE, while the Applicant has the burden of proof, those asserting a specific detriment have the burden of proof as to that allegation.³² Finally, UE notes that the Applicant is not required to show that the transfer is beneficial to the public.³³

Staff points out that this is the Commission's first contested case under Section 393.190.1 since *AG Processing*, a decision in which the Missouri Supreme Court reversed a Commission decision under that section.³⁴ That case held, Staff asserts, that the Commission must evaluate both the present and future impacts of a transfer at the time it makes its decision. Staff further contends that, while the "not detrimental" standard applies to the transfer itself, UE seeks some additional relief that is governed by other, higher standards. For example, Staff argues that

²⁶ Commission Rule 4 CSR 240-2.060(7)(D).

²⁷ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

²⁸ See *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220.

²⁹ *St. ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. banc 1934).

³⁰ *Fee Fee Trunk Sewer*, *supra*.

³¹ *In the Matter of KCP&L*, Case No. EM-2001-464 (*Order Approving Stipulation & Agreement and Closing Case*, issued Aug. 2, 2001).

³² *Anchor Centre Partners, Ltd. v. Mercantile Bank, NA*, 803 S.W.2d 23, 30 (Mo. banc 1991); *In the Matter of Gateway Pipeline Co., Inc.*, Case No. GM-2001-585 (*Report & Order*, issued Oct. 9, 2001).

³³ *In the Matter of Sho-Me Power Corp.*, Case No. EO-93-259 (*Report & Order*, issued Sep. 17, 1993).

³⁴ *AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732 (Mo. banc 2003).

UE seeks several ratemaking determinations that are subject to the “just and reasonable” standard and that UE seeks a waiver from the Commission’s affiliate transaction rules governed by the “best interests of the regulated customers” standard.

Public Counsel, in turn, agrees that Section 393.190.1 requires prior Commission authority for a utility to transfer any part of its system or assets; such authority is to be granted only where the proposed transfer is “not detrimental to the public interest.”³⁵ The applicant utility bears the burden of proof and, contrary to UE’s notion, this burden does not shift. Public Counsel urges the Commission to ignore UE’s quotations of erroneous language from past Commission orders that approval must be granted unless “compelling” evidence shows that a “direct and present” detriment is “likely” to occur. Instead, as recently articulated by the Missouri Supreme Court in *AG Processing*, and restated by the Commission itself,³⁶ “a detriment to the public interest includes a risk of harm to ratepayers.” Thus, Public Counsel takes the position that the mere risk itself of higher rates in the future is a detriment to the public. Public Counsel insists that the law requires that the Commission deny the proposed transaction even if the detriments found are the result of events that would simply be set into motion or which involve the probability of significant harm which could likely occur, but is not certain to occur.

In the *AG Processing* case, the Commission approved an acquisition and merger by Aquila, Inc. – then called UtiliCorp – that involved an acquisition premium of \$92,000,000.³⁷ Although the Commission rejected Aquila’s proposed regulatory plan, under which a portion of the acquisition premium would be recovered in rates, the Commission refused to consider the recoupment of the acquisition premium on the grounds that it was a rate case issue. The Missouri Supreme Court reversed, saying:

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC’s refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it

³⁵ *City of St. Louis, supra*.

³⁶ *In the Matter of Aquila, Inc.*, Case No. EF-2003-0465 (*Report & Order*, issued Feb. 24, 2004) pp. 6-7, *In the Matter of Aquila, Inc.*, Case No. EF-2003-0465 (*Report & Order*, issued Feb. 24, 2004) pp. 6-7.

³⁷ An acquisition premium is the amount by which the purchase price exceeds the book value of the assets purchased.

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failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.³⁸

The Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing*, but rather restated the existing "not detrimental to the public" standard. In particular, the Court clarified the analytical use of the standard. What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. The *AG Processing* decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. Approval should be based upon a finding of no net detriment. Likewise, contrary to UE's position, the *AG Processing* decision does not allow the Commission to defer issues with ratemaking impact to the next rate case. Such issues are not irrelevant or moot because UE is under a temporary rate freeze; the effects of the transfer will still exist when the rate freeze ends.

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.

Resolution of Contested Issues:

The Commission has determined that it must resolve the contested issues set out below in order to determine whether or not the proposed transfer would have a net detrimental effect on the public interest.

1. Generation-related Issues:

The Commission has found that UE needs additional capacity, both now and in the future, and that the additional energy made available by the transfer would be cheaper, on a per-MWh basis, than either purchased power or power generated by CTGs. Underlying these findings is the Commission's finding that the reserve margin figure selected by UE is reasonable and appropriate. UE calculated the generation-related savings at \$2.4 million annually. These points weigh in favor of the proposed transfer.

³⁸ *AG Processing*, *supra*, 120 S.W.3d at 736 (internal footnotes omitted).

Public Counsel and Staff claim that the proposed transfer would be detrimental to the public interest if it is not, in fact, the least cost alternative. The Commission is, of course, concerned that necessary additional capacity be added at no greater cost to ratepayers than necessary. However, the Commission's greater concern in this case is that it not be a vehicle whereby the Ameren group shifts costs to Missouri ratepayers in order to maximize its revenues from its unregulated activities.

The Commission agrees with UE and Staff that the appropriate alternative with which to compare the proposed transfer is the option of building CTGs. The Commission has found that RFPs are inappropriate in long-term resource planning and that the output of the Joppa Plant will not be available after the end of 2005. The Commission has also found that the generation-related savings realized from the transfer must be reduced from \$2.4 million, as calculated by UE, to \$1.7 million annually in order to remove the inappropriate level of revenue from the sale of SO₂ emission allowances. The Commission has further found that the level of generation-related benefits must be further reduced by \$0.8 million in order to remove the effect of the escalation factor that Mr. Voytas admittedly applied only to the CTG option. Thus, the Commission finds that the level of generation-related savings conferred by the Metro East transfer would be \$0.9 million annually. This level of difference between the two options is, as Dr. Proctor testified, so "thin" as to make them essentially identical in economic terms.³⁹

With respect to the JDA, Staff urges two amendments as conditions of the approval of the proposed transfer. The first of these, the sharing of the profits of off-system sales based on comparative generation rather than comparative load, UE is willing to accept. The record shows that that amendment will yield about \$7.0 million annually to UE. This figure is an additional benefit that the transfer would confer.

The second recommended JDA amendment has to do with the pricing of inter-company energy transfers. Currently, such transfers are accounted for at incremental cost. Staff recommends that they be accounted for at market price instead. UE is not willing to accept this amendment, characterizing it as a complex matter requiring further study. UE is willing, however, to "study alternatives" in cooperation with Staff. UE has also proposed an alternative to this amendment, to address the potential detriment relating to pricing these transfers at incremental cost instead of market, discussed further below.

The record shows that, under the JDA and the related Power Supply Agreement that bind UE, CIPS and Genco into a single control area, the Metro East load transferred from UE to CIPS must still be served by whatever power supplies are available to UE and Genco through the end of 2006. Therefore, of the 597 MWs of additional capacity made available by the Metro East transfer, any portion not needed by UE to serve its native load will be available to serve CIPS' native load, including UE's former Metro East ratepayers. If CIPS needs any of this power, it cannot be sold off-system at market price. Instead, AEG will pay only incremental

³⁹ Proctor was speaking of the \$2.4 million figure. Presumably, these considerations are all the more pertinent to the lower figure of \$0.9 million.

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cost for any power generated by UE that it uses. UE's fixed costs, however, will be the sole responsibility of UE's Missouri customers after the transfer, with no contribution from CIPS or from the Metro East ratepayers.

The record does not show whether or not CIPS and Genco have sufficient capacity to absorb the transferred Metro East load without substantial power input from UE.⁴⁰ Because UE has the burden of proof, this failure of proof requires a finding that substantial input from UE would be required. The Commission finds that the sale of power by UE to AEG to serve the transferred Metro East load at incremental cost, with no contribution to fixed costs, would be detrimental to the interests of UE's Missouri customers. An additional detriment is the value of the lost off-system sales revenue for the power used by CIPS, less the value of the incremental costs actually paid by AEG.⁴¹

If the financial effects of the JDA sought to be addressed by the second amendment are not addressed in a fair and equitable manner, then the transfer could indeed result in shifting costs to Missouri ratepayers in order to benefit the Ameren group as a whole. The Commission cannot permit that result to occur. However, those effects can be addressed in a different way than the second amendment to the JDA recommended by Staff. In summary, as addressed in more detail below, a mechanism can be established whereby revenues can be imputed to UE unless UE is able to establish in its next rate proceeding that the benefits to Missouri ratepayers arising from the transfer exceed the negative financial effects caused by the incremental cost pricing of additional energy transfers from UE to AEG that will occur as a result of the transfer.

2. Transmission-related Issues:

Staff asserts that the transfer should not be approved because UE's Missouri ratepayers might someday be required to pay transmission costs in order to receive the power generated at UE's Illinois and Iowa power plants. Dr. Proctor described a "worst-case scenario" that would cost Missouri ratepayers \$13.8 million annually. While the record suggests that this outcome is not likely, the Commission must nonetheless consider it.

UE's analysis of the revenue requirement impact of the transfer in the transmission area revealed a substantial monetary benefit for Missouri ratepayers. Staff's own expert on this topic, Dr. Proctor, filed an affidavit stating that UE had understated the level of this monetary benefit. Proctor calculated the net annual benefit of the transfer at \$2.033 million, increasing to \$3.089 million after movement to MISO.

3. Issues Related to the Decommissioning Trust Fund:

UE seeks leave to reduce its decommissioning contribution by \$272,554, the amount collected annually from its Metro East ratepayers. Staff and Public Counsel

⁴⁰ Dr. Proctor testified, "Under the current JDA, the excess base-load capacity gained from the transfer must be used to serve the load that was transferred rather than be available for spot market sales. Moreover, the excess base-load generation that would have otherwise been available to sell into the wholesale spot market is committed to serve the Ameren CIPS load at Ameren's incremental cost." Ex. 14:10.

⁴¹ The likely value of this detriment was never quantified in the record.

oppose this proposal and contend that permitting UE to stop making this portion of its annual Decommissioning Trust Fund contribution would harm Missouri ratepayers. The Commission agrees with Staff and Public Counsel.

As a matter of simple common sense, any dollars not contributed now are dollars that will not be available when decommissioning starts in 2024. While the Commission does not reject UE's "Zone of Reasonableness" analysis, it recognizes that that analysis is merely a forecast of the result of the complex interactions of numerous factors over many years. However artfully devised and implemented, the forecast may prove to be wrong. It is reasonable, therefore, to require UE to continue to contribute the portion of the decommissioning cost allocated to the Metro East ratepayers until the next triennial review establishes a new contribution level based on changed circumstances and a new forecast.

In connection with this point, UE explains that the Commission has required it to establish and maintain the Decommissioning Trust Fund in a manner that takes the maximum advantage of the provisions of the Internal Revenue Code in order to reduce the amount of the fund lost to federal taxes so far as is possible. UE asserts that, if the Commission requires UE to increase the amount of its Missouri-jurisdictional contribution by \$272,554 annually, it will not be able to continue to make tax-deductible contributions to the fund under existing rulings by the Internal Revenue Service. It will have to seek new rulings. In order for UE to obtain these rulings, the Commission will have to find that the new contribution amount of \$6,486,738 is included in UE's Missouri-jurisdictional cost-of-service for ratemaking purposes. Further, UE states that the Commission will also have to find that the new contribution amount was established based on the economic and financial input parameters used in the "Zone of Reasonableness" analysis attached as Schedule 4 to Redhage's Surrebuttal Testimony. UE points to Regulation 26 C.F.R. Section 1.468A-3(g):

(g) Requirement Of Determination By Public Utility Commission Of Decommissioning Costs To Be Included In Cost Of Service. The Internal Revenue Service shall not provide a taxpayer with a schedule of ruling amounts for any nuclear decommissioning fund unless a public utility commission that establishes or approves rates for electric energy generated by the nuclear power plant to which the nuclear decommissioning fund relates has—

(1) Determined the amount of decommissioning costs of such nuclear power plant to be included in the taxpayer's cost of service for ratemaking purposes; and

(2) Disclosed the after-tax return and any other assumptions and determinations used in establishing or approving such amount for any taxable year beginning on or after January 1, 1987.

The language of the cited regulation is clear. The Commission will make the requested findings. The Commission finds that UE's new Missouri jurisdictional

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Decommissioning Trust Fund annual contribution amount of \$6,486,378 is included in UE's Missouri-jurisdictional cost-of-service for ratemaking purposes and is established based on the economic and financial input parameters used in the "Zone of Reasonableness" analysis attached as Schedule 4 to Kevin Redhage's Surrebuttal Testimony.

If UE continues to contribute the Metro East share of the decommissioning expense until September 1, 2005, the Commission considers the Decommissioning Trust Fund issues to be neither detrimental nor beneficial to the public interest.

4. Costs and Liabilities:

This category includes costs and liabilities, both known and unknown, arising from events occurring prior to the transfer and also costs that may be incurred for future capital improvements required by environmental regulations. The scope of the latter is not now certain, but estimates of some of these amounts exist in UE's 10-K filed with the S.E.C.

The Commission considers it inequitable, and thus detrimental, to transfer to Missouri ratepayers all of the share of UE's pre-closing costs and liabilities now borne by the Metro East ratepayers. Most of these liabilities are not presently known and it is thus not possible for the Commission to weigh them against the benefits that the transfer will produce. However, the "worst case scenario" for the Sauget remediation alone is a significant amount. Likewise, any pre-closing environmental liabilities that become apparent only after the transfer has occurred are also likely to be significant amounts. The Commission is of the opinion that an appropriate condition must be imposed on the transfer in order to protect Missouri ratepayers from these unknown but potentially significant costs.

If the proposed transaction is approved, UE's Missouri customers will become responsible for an additional 6-percent slice of any costs relating to capital improvements at UE's power plants necessary to meet changing environmental regulations. As already discussed, the Metro East ratepayers would continue to be served by that generation, free of any responsibility for these costs. Based on figures in UE's 10-K filed with the S.E.C., the potential annual impact of the additional share of costs relating to such capital improvements is estimated at \$5.1 million to \$7.0 million annually.

5. Natural Gas Issues:

These issues are purely factual. Staff presented testimony suggesting that the natural gas aspects of the proposed transaction may result in certain detrimental impacts on UE's Missouri gas and electric operations. The record shows that the asserted detrimental impacts are not likely to occur. The record further shows that, if they do occur, their impact would be \$0.01 million for the Fisk/Lutesville LDC and \$0.98 million for the power plants.

Cost-benefit Analysis:

A cost-benefit analysis compares costs to benefits to determine whether a net cost or a net benefit is likely to result. The costs and benefits identified in this proceeding are set out below:

Description	Benefits	Detriments
Generation-related savings	\$ 0.900 million	--
JDA amendment to share profits by generation	\$ 7.000 million	--
Transmission-related savings	\$ 2.033 - 3.089 million	--
Decommissioning Trust Fund issues	--	--
JDA requirement that surplus UE power be available to CIPS at incremental cost	--	?
Possible transmission charges	--	\$ 13.800 million
Sauget remediation	--	\$ 1.560 million (one-time cost)
Future environmental capital investments	--	\$ 5.100 - 7.000 million
Natural gas: possible Fisk/Lutesville impact	--	\$ 0.010 million
Natural gas: possible power plant impact	--	\$ 0.098 million
TOTALS:	\$ 9.933 - 10.989 million	\$ 19.008 - 20.908 million
DIFFERENCE:		\$8.019 - 10.975 million (plus a possible one-time cost of \$1.56 million)

A comparison of the benefits of the proposed transfer, conservatively calculated, to the possible negative impacts reveals that, if the transfer's certain benefits are realized at what has been characterized as the lowest possible level, and all of the potential negative impacts do actually occur, the public interest will sustain a detriment on the order of \$8 million to \$11 million dollars annually, plus a possible one-time cost of \$1.56 million for remediation of the Sauget site.

However, this is not the end of the analysis. The benefits itemized above are certain, while the detriments, for the most part, are not. UE expects that the benefits will actually be much greater than the level shown above, and the record shows that this expectation is not unreasonable. For example, UE expects that the JDA amendment it has offered will more likely yield \$24.0 million annually than \$7.0 million. Additionally, load-growth and high natural gas prices will both magnify the level of the benefits. Both of these conditions are so likely as to be nearly certain. However, even if the Commission considers the benefits at a conservative level and the detriments at the "worst-case scenario" level, the Commission can impose conditions on the transfer that will mitigate any potential detriments.

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Necessary Conditions:

The Commission has authority to impose conditions on a proposed asset transfer in order to ensure that the transfer does not have detrimental effects. The Commission's Staff proposed a number of conditions.

1. Ratemaking Treatment:

Staff advised the Commission, as is its practice in asset transfer cases, to state that no ratemaking treatment is intended. The Commission will continue its usual practice, with such exceptions as are noted below.

2. The JDA:

Staff recommended that the Commission require amendment of the JDA: (1) to distribute profits from off-system sales on the basis of generation rather than load; and (2) to price the incremental inter-company energy transfers resulting from the Metro East transfer at market price rather than at incremental cost. Staff further recommended that the Commission require UE to terminate the JDA if these amendments cannot be obtained.

Termination of the JDA would expose Missouri ratepayers to transmission charges on power generated at UE's Illinois and Iowa power plants. This was Staff's primary concern with respect to the transfer of the transmission facilities. The Commission will not include any condition requiring termination of the JDA.

UE has offered to make the first amendment to the JDA that Staff recommended and the Commission will require that condition. UE has not agreed to make the second JDA amendment recommended by Staff, but has committed to doing an analysis of inter-company energy transfer pricing with a view to possibly modifying the JDA in the future. However, the record shows, and the Commission has found, that the transfer would be detrimental to the public if the Commission does not impose a condition to address the possibility of a detriment from the inter-company energy transfer pricing currently in the JDA. If the Commission does not impose such a condition, the Ameren group could shift costs to Missouri ratepayers for the benefit of Ameren's unregulated activities. The Commission will impose a condition that requires revenues to be imputed to AmerenUE in a future rate case unless AmerenUE is able to prove that benefits directly resulting from the Metro East transfer exceed the difference between market price and incremental cost for incremental inter-company energy transfers.

Staff's recommendation, as proposed, would have the effect of reducing AmerenUE's Missouri revenue requirement to the benefit of Missouri ratepayers by an amount equal to the increased margins AmerenUE would receive from energy transferred to AEG at market prices rather than at incremental cost. That effect would occur, if Staff's proposed second JDA amendment is required, without regard to whether the Metro East transfer otherwise produces benefits for Missouri ratepayers. If the Commission requires Staff's proposed second JDA amendment, and if actual results after the transfer demonstrate that the Metro East transfer provided affirmative benefits to Missouri ratepayers, Missouri ratepayers would receive both those increased margins caused by the second amendment to the JDA, in addition to the benefits that flowed from the Metro East transfer independent of this JDA issue. This result would unfairly penalize AmerenUE, so the Commis-

sion will not adopt the Staff's proposed second JDA amendment, but rather allow AmerenUE the opportunity in a future rate case to prove that benefits from the Metro East transfer outweigh revenues that it would have received if the second JDA amendment were required.

Specifically, the Commission will require that revenues be imputed to AmerenUE equal to the difference between the market prices AmerenUE could have received for the increased quantities of energy transferred to AEG as a result of the Metro East transfer and the incremental cost that AmerenUE actually received for such transfers under the JDA, unless AmerenUE is able to demonstrate, in its next general rate proceeding, that the benefits from the Metro East transfer exceed that difference. If AmerenUE meets its burden to demonstrate that such benefits exceed such difference, then revenues will not be imputed.

3. Costs and Liabilities:

Staff recommended a number of conditions relating to liabilities and costs, which are summarized here. Staff notes that these liabilities and costs fall into two categories, those directly assigned to the Illinois ratepayers and those allocated between Illinois and Missouri. Staff recommends that costs and liabilities directly relating to UE's Illinois operations shall transfer to CIPS, whether arising pre-transfer or post-transfer. As to allocated costs and liabilities, Staff recommends that amounts allocated to UE's Illinois retail operations shall either transfer to CIPS or be separately tracked by UE in its books and records until either the amount that would have been allocated to Illinois is reduced to zero or UE can demonstrate savings due to the transfer that exceed those amounts. Staff further recommends that UE forego recovery of 8% of pre-closing generation-related liabilities, including litigation costs, employee-related items, product liabilities, and environmental-related capital costs and liabilities. Staff also recommends that UE be responsible for post-closing generation-related costs and liabilities, but shall be required to use its "best efforts to maximize contributions to offset these costs and liabilities from entities other than AmerenUE that receive the benefit of the power from these generation assets." Finally, Staff recommends that UE shall forego recovery of all pre-closing natural gas-related costs and liabilities.

The Commission is of the opinion that pre-closing liabilities that are directly assignable to UE's Illinois retail operations, or to the transferred assets, must transfer to CIPS as a condition of the Commission's approval of the transfer. Otherwise, the transfer would be detrimental to the public interest. To the extent that UE retains any such liabilities, contrary to the opinion of the Commission, such amounts shall be excluded from rates in the future.

With respect to allocated liabilities, the record shows that the proposed transfer would expose Missouri ratepayers to a risk of increased costs related to environmental and other pre-closing liabilities. Specifically, the increased risk is that Missouri ratepayers will have to pay the 6-percent share of such potential liabilities now borne by the Metro East ratepayers. Most of these liabilities are presently unknown and it is not possible, consequently, to accurately assess this risk. In the absence of proof on this point, the Commission must assume that the risk is substantial. The record reveals that, when CIPS and CILCO transferred generation assets to Genco and AERG, they agreed to indemnify them for any pre-transfer,

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asbestos-related claims. UE's agreement with CIPS does not contain any such indemnity clause and UE has refused to agree to hold harmless its Missouri ratepayers with respect to the additional 6-percent share of this risk that the transfer will impose on them, although it has proposed conditions that will require Missouri ratepayers to pay the costs associated with this risk only if benefits to them are proven to outweigh such costs. The Commission is of the opinion that some such protective mechanism is necessary if the transfer is to occur. For that reason, the Commission will exclude 6-percent of any such liabilities arising from pre-closing events and conditions from UE's rates as a condition of its approval of the transfer, unless AmerenUE, in a future rate case where it seeks to recover 6-percent of such liabilities, is able to prove that benefits directly flowing from the Metro East transfer are greater than 6-percent of these liabilities. In addition to unknown environmental and other liabilities, this includes general corporate liabilities and pre-closing natural gas costs not directly assignable to UE's Illinois retail operations.

One pre-closing environmental liability is known, namely, the Sauget remediation. If the proposed transfer did not occur, the Metro East ratepayers would be responsible for 6-percent of the Sauget remediation costs. The Commission is of the opinion that the transfer of this liability to UE's Missouri ratepayers would be detrimental to the public interest. Therefore, as a condition of its approval of the transfer, the Commission will exclude from rates 6-percent of any costs incurred by UE in the Sauget remediation unless, as with the other liabilities discussed above, UE can meet its burden to establish that such costs are outweighed by transfer-related benefits. The potential Sauget costs will therefore be treated like other liabilities discussed above.

The remaining category of liabilities concerns future capital investments required to meet increasingly stringent environmental standards. The Company is due a return of and on its capital investments dedicated to the public service and those amounts are collected from ratepayers in rates. These are generation-related costs and the generation resources will stay with UE; however, if the transfer did not occur, the Metro East ratepayers would be responsible for 6-percent of these costs. Staff's suggested condition was that UE use its "best efforts to maximize contributions to offset these costs and liabilities from entities other than AmerenUE that receive the benefit of the power from these generation assets." The Commission is of the opinion that the condition recommended by Staff on this point is unnecessary because the benefits of the proposed transfer outweigh these potential costs, even if realized at the level feared by Public Counsel. They may not be realized at that level. The Commission notes that potential prospective environmental liabilities of this sort are an inevitable *quid pro quo* of the use of relatively low-cost, coal-based generation.

4. SO2 Allowances:

The Commission has already adjusted the level of generation-related benefits to reflect the fact that the record shows that UE included a level of revenue from SO2 emission allowances sales that cannot be sustained over 25 years.

The Commission agrees with UE that the SO2 allowance bank management issue has no place in this case because it is not a matter directly related to the proposed transfer. Its relevance is the exposure of Missouri ratepayers to an

additional 6-percent slice of any such costs as may actually occur. These costs, in fact, are included among the environmental liabilities discussed above. For this reason, the Commission is of the opinion that the further condition recommended by Staff on this point is unnecessary. If events ever do occur that call into question UE's prudence in managing its allowance bank, the Commission will take appropriate action at that time.

5. Identification of Assets:

This issue was settled by the parties.

6. Natural Gas Issues:

Staff recommends that UE be required to renegotiate the Fisk/Lutesville, Alton and other Illinois gas transportation contracts as a package. Further, Staff recommends that Fisk/Lutesville pay rates no higher than Alton pays. Additionally, Staff recommends that UE hold harmless its electric customers from any change in costs due to the loss of the beneficial arrangement of its Illinois power plants and the Alton LDC.

The Commission is of the opinion that the conditions recommended by Staff on this point are unnecessary because the benefits of the transfer outweigh the potential detriment, even if Staff's "worst-case scenario" should occur. The record suggests that the potential detriments identified by Staff are not likely to occur and would have minimal impact if they did.

7. Affiliate Transaction Rules:

Staff recommends that the Commission limit the waiver of the affiliate transaction rules to the pricing portion of the rules only and that the record-keeping portion of the rules should not be waived.

The Commission will not waive the record-keeping portion of the affiliate transaction rules.

8. The Nuclear Decommissioning Trust Fund:

UE has offered to contribute the \$272,554 now collected from the Metro East ratepayers until the next triennial review. This offer is essentially equivalent to Staff's recommended condition on this point. The Commission will require the contribution offered by UE and will make the findings requested by UE to support the desired tax treatment of that contribution.

9. Transmission:

Staff recommends that the transfer be delayed until UE has done a study showing that there would be no detrimental impact on operations or revenue requirement. Staff further recommends that UE hold harmless its Missouri retail customers from any detrimental impact. Staff also recommends that UE forego recovery of any increased transmission costs solely due to the transfer. Staff also recommends that UE shall ensure that 405 MWs are available to replace the 405 MWs now obtained from EEInc.'s Joppa plant. Finally, Staff recommends that the Commission open a case to investigate Ameren's decision to not make 405 MWs available from EEInc.'s Joppa plant after December 31, 2005.

The Commission notes that UE has done the analysis requested by Staff. Therefore, that recommendation is no longer an issue.

The Commission does not need UE to agree to hold Missouri ratepayers harmless or to agree to forego recovery of increased transmission costs. In order

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to protect Missouri ratepayers from the risk of increased transmission costs resulting solely from the Metro East transfer, the Commission will exclude any such costs from UE's rates in the future as a condition of its approval of the transfer. The Commission agrees with UE that the record shows that such increased costs are unlikely. Dr. Proctor, who testified as to these possible costs, rated them as only 20-percent to 25-percent likely. Nonetheless, the level of these costs is such that additional protection for Missouri ratepayers is necessary.

The Commission considers the recommended conditions relating to the Joppa plant to be unnecessary. The record shows that the power received under the contract with EEInc. will be replaced by new capacity at the Venice plant. The Commission further considers that the record contains satisfactory explanations for the end of that contract.

10. Access to Books, Records, Employees, and Officers:

Staff recommends that UE, Ameren, and UE's affiliates be required to make these available and to waive any claim that they are not available under PUHCA or because they are not in UE's possession or control.

The Commission is of the opinion that this condition is unnecessary because it has not waived the record-keeping requirements of the affiliate transaction rules.

The purpose of these conditions is to protect ratepayers by mitigating or avoiding the possible detriments. Set out below is an amended cost-benefit analysis reflecting the conditions adopted by the Commission. The figures changed by the above-conditions are in bold. The difference is now shown in the Benefits column because, with the conditions adopted by the Commission, the benefits of the transfer will outweigh the possible detriments.

Description	Benefits	Detriments
Generation-related savings	\$ 0.900 million	--
JDA amendment to share profits by generation	\$ 7.000 million	--
Transmission-related savings	\$ 2.033 - 3.089 million	--
Decommissioning Trust Fund issues	--	--
JDA requirement that surplus UE power be available to CIPS at incremental cost	--	\$ 0
Possible transmission charges	--	\$ 0
Sauget remediation	--	\$ 0
Future environmental capital investments	--	\$ 5.100 - 7.000 million
Natural gas: possible Fisk/Lutesville impact	--	\$ 0.010 million
Natural gas: possible power plant impact	--	\$ 0.098 million
TOTALS:	\$ 9.933 - 10.989 million	\$ 5.928 - 7.828 million
DIFFERENCE:	\$ 2.105 - 5.061 million	

Conclusion:

Based on its review of the Application, the testimony and exhibits adduced at the hearing, and the briefs, memoranda and arguments of the parties, and with the imposition of the conditions listed above, the Commission concludes that the proposed transfer is not detrimental to the public interest and should be approved. The Commission expressly notes that, in the absence of these conditions, the transfer would cause a substantial detriment to the public interest such that it could not be approved.

IT IS THEREFORE ORDERED:

1. That the Motion for Issuance of a Preliminary Order, filed by AmerenUE, on October 4, 2004, is denied.
2. That the Application filed on August 25, 2003, by AmerenUE, is approved, subject to the conditions herein set out. AmerenUE is hereby authorized to transfer its electric and natural gas retail operations in Illinois, including associated system assets, to AmerenCIPS, including normal additions and retirements since December 31, 2003; and is further authorized to perform in accordance with its Asset Transfer Agreement with AmerenCIPS. The parties are further authorized to take such other lawful actions as may be reasonably necessary to consummate the transaction herein authorized.
3. That the Commission hereby waives the pricing portion, but not the record keeping requirements, of Commission Rules 4 CSR 240-20.015 and 4 CSR 250-40.015, pertaining to Affiliate Transactions, with respect to the Application approved in Ordered Paragraph 2, above.
4. That AmerenUE shall amend its Joint Dispatch Agreement to provide that profits from off-system sales are shared on the basis of generation output rather than based on load.
5. That, in a future rate case, revenues equal to the difference between the market prices AmerenUE could have received for incremental (i.e., as a result of the transfer herein authorized) energy transfers between the companies governed by the Joint Dispatch Agreement and the revenues AmerenUE actually received for such transfers will be imputed unless AmerenUE proves by a preponderance of the evidence that benefits directly flowing from the transfer authorized herein are greater than that difference.
6. That Union Electric Company, doing business as AmerenUE, shall annually contribute \$6,486,378 to the Decommissioning Trust Fund with respect to its Missouri-jurisdictional operations pending the further order of this Commission. This amount is included in Union Electric Company, doing business as AmerenUE's Missouri-jurisdictional cost-of-service for ratemaking purposes and is established based on the economic and financial input parameters used in the "Zone of Reasonableness" analysis attached as Schedule 4 to Exhibit 2 received in this proceeding. Union Electric Company, doing business as AmerenUE, shall transfer 98-percent of the contents of the Illinois Retail Subaccount to the Missouri Retail Subaccount.
7. That AmerenUE may seek recovery in a future rate proceeding (a rate increase or an excess earnings complaint) of up to 6% of the unknown generation-related liabilities associated with the generation that was formerly allocated to AmerenUE's Metro East service territory, if it proves by a preponderance of the evidence that the sum of the Missouri ratepayer benefits attributable to the transfer in the applicable test year is greater than the 6% of such unknown generation-related liabilities sought to be recovered. AmerenUE will be entitled to recover that part of the 6% that is offset by benefits directly flowing from the transfer. Transfer-related benefits in this Paragraph and Ordered Paragraph 5 may only be used once (that is, the same dollar amount of transfer-related benefit cannot be used to offset unknown

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generation-related liabilities sought to be recovered pursuant to this Paragraph and to offset revenues imputed pursuant to Ordered Paragraph 5).

8. That Union Electric Company, doing business as AmerenUE, as a condition of the approval herein contained, shall not recover in rates any portion of any increased costs due solely to transmission charges for the use of the transmission facilities herein transferred to AmerenCIPS to the extent that the costs in question would not have been incurred had the facilities not been transferred.

9. That by closing the Metro East transfer and transferring the Metro East assets pursuant to the permission granted herein, AmerenUE shall and hereby is deemed to have consented to each and every condition imposed by this order.

10. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions or expenditures herein involved, except as is expressly stated to the contrary. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

11. That the three Stipulations and Agreements submitted by the parties during the course of this proceeding, relating to charges by AMS (Ex. 33), the 13.8kV switchgear at the Venice generating plant (Ex. 60), and the Asset Transfer List (Ex. 67), are hereby approved. The parties are directed to comply with the terms of these agreements.

12. That Union Electric Company, doing business as AmerenUE, shall file a pleading in this case within ten (10) days of the consummation of the transfer herein authorized, so advising the Commission.

13. That Staff's Motion for Leave to File the Affidavit of Dr. Proctor, filed on April 27, 2004, its Motion for Leave to Late-file its Initial Brief, filed on May 18, 2004, and its Motion for Leave to Late-file its Table of Contents and Conclusions to its Initial Brief, filed on May 19, 2004, are granted. All other pending and unruléd motions are denied.

14. That this Report and Order shall become effective on February 20, 2005.

15. That this case may be closed on February 21, 2005.

Davis, Ch., Murray and Appling, CC., concur;
Gaw, C., dissents, with dissent to follow;
Clayton, C., dissents;
certify compliance with the provisions of
Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

Since my appointment to the Commission on April 2, 2001, I have had the opportunity to hear and decide numerous cases. Recognizing that the Commission consists of five individuals, it is a foregone conclusion that the Commission will inevitably issue certain decisions that are contrary to the views of any specific

Commissioner. Originally, this Commission issued a unanimous decision, based upon the merits of this case, which concluded that this transaction was detrimental to the Missouri ratepayers unless certain conditions were imposed. Recently, the majority reversed course and issued its Report and Order on Rehearing. As I mentioned at the time of the Commission decision, I cannot recall a time when I was as disappointed as I am in the majority's decision to issue this Report and Order.

The record and pleadings in this case indicate that this decision was reached: (1) in an atmosphere of veiled threats and intimidation imposed on the Commission by the Applicant; (2) with significant evidence, some of which was available but not considered by the Commission, to conclude that this transaction could have a long-term and significant negative impact on the Missouri ratepayers of AmerenUE; (3) without reviewing and considering the pleadings and evidence of contrary parties; and (4) in a manner which arguably denies the opposing parties their due process of law. Although the majority has stated that it would protect the ratepayers from these detrimental effects in subsequent rate proceedings, such protection may be impossible if Staff's projections become reality and the detriments from this transaction exceed the benefits. For all of these reasons, I must dissent from the decision issued by the majority in the above captioned proceeding.

I. INTRODUCTION

At first glance, this case appears fairly straightforward: a regulated utility is seeking Commission authority to sell a portion of its assets. If this transaction involved a sale of a portion of an ongoing concern between businesses operating in an unregulated arena, the self-interests of the two businesses would normally ensure that the transaction protected both. The purchaser would, at a minimum, inspect the assets and books of the business it was buying and pay a price that would allow a reasonable return on its investment. Similarly, the seller would normally expect at least fair market, and would only sell if the sale made sense in its long range goals.

The factors of self interest which assure such safeguards are not present in this case. Here, there is a proposed sale of AmerenUE's business in Illinois to an affiliated company – AmerenCIPS. The parent company's (Ameren's) concern about the transaction is that it maximizes profits for Ameren, not whether its subsidiary AmerenUE or its ratepayers fare better or worse in the transaction than its subsidiary AmerenCIPS. Even if AmerenUE gets a bad deal and AmerenCIPS a good deal, AmerenUE will not be heard to protest. If the transaction is of benefit to the parent, its subsidiaries' interest and that of the subsidiaries' customers are subservient. In fact, as opposed to many cases before the Commission where the interests of the regulated utility and its customers are in conflict, here the interests are much more aligned. The Commission is the entity in this transaction that has the authority to protect the interest of Ameren UE's ratepayers and AmerenUE itself and we have a duty to do so.

II. HISTORY/BACKGROUND

On October 6, 2004, a unanimous Commission issued its first Report and Order in this proceeding. In that Order, the Commission concluded that this

transaction, as proposed by AmerenUE, would be detrimental to the public interest and could not be approved without conditions. In an effort to assist AmerenUE in completing this transaction while simultaneously ensuring that public detriment would not occur, the Commission suggested several conditions which, if agreed to by AmerenUE, would allow the Commission to approve the transaction. Specifically, the Commission suggested that AmerenUE modify the transaction by:

1. Amending the Joint Dispatch Agreement (“JDA”) to distribute profits from off-system sales on the basis of generation rather than load;
2. Amending the JDA to price inter-company energy transactions at market rather than at incremental cost;
3. Holding Missouri ratepayers harmless from any increased allocation of pre-closing liabilities currently born by the Illinois ratepayers of AmerenUE.
4. Refusing to waive the record-keeping portion of the Commission's affiliate transactions rules.
5. Requiring AmerenUE to continue the nuclear decommissioning contribution previously provided by the Illinois ratepayers.
6. Excluding any future transmission costs associated with the transfer to AmerenCIPS of the transmission facilities linking the Illinois generating facilities to the Missouri load.

On October 15, 2004, AmerenUE filed its Motion for Rehearing. In its Motion, AmerenUE noted that two of the conditions were not acceptable to AmerenUE, primarily the conditions related to pre-closing liabilities and amendment of the JDA to price energy transfers at incremental cost. AmerenUE noted that the imposition of these conditions threatened not only the benefits associated with the Metro East transfer, but also the actual transfer of the Pinckneyville and Kinmundy Combustion Turbine Generators.¹ In the same document, AmerenUE also sought to retreat from its previously litigated positions and instead engage the Commission itself in

¹ AmerenUE's interjection of the transfer of the Pinckneyville and Kinmundy CTs is particularly interesting given that the Company specifically argued that the transfer of these CTs is not germane to the issues in this proceeding. Specifically, AmerenUE witness Craig D. Nelson notes that “[t]he transfer of the Pinckneyville and Kinmundy plants . . . is not an issue in the present case because that transfer does not impact the question of whether the Metro East Transfer is detrimental to the public. . . I would agree that I not only ‘prefer’ those transfers not be an issue, but I would submit that they in fact are not an issue because they do not bear on whether or not the Metro East Transfer is detrimental.” Given AmerenUE's previous contention that Pinckneyville and Kinmundy transfer was not an issue in this proceeding, one must necessarily question its motives in subsequently reversing course in the context of its Motion for Rehearing and claiming that the transfer of these units was now “unlikely”.

negotiations regarding the appropriate conditions to place on this transaction.² In essence by issuing this Order without allowing a proper hearing the Commission has taken Ameren up on its offer to negotiate behaving more like a party than a decision maker.

Virtually simultaneous with its Motion for Rehearing, AmerenUE sought to interject an additional issue from another case. On October 28, 2004, AmerenUE announced that it had reached an agreement to provide electric energy and capacity to Noranda Aluminum under the terms of a 15 year contract. Similar to statements regarding the Pinckneyville and Kinmundy CTs, AmerenUE again threatened that it would not execute the Noranda agreement unless the Commission approved the Metro East transfer on terms solely acceptable to AmerenUE.³ Given the critical economic nature of the Noranda smelting unit to the Southeast Missouri region as well as concerns regarding the long-term viability of Noranda without the access to low priced reliable electric energy, AmerenUE effectively sought to force the Commission to choose between either: (1) accepting the recognized detriments of the Metro East transfer with conditions UE then proposed and (2) the possibility of losing the Noranda smelting facility and the associated 1,100 jobs. Because of the announcement of the Noranda agreement, as well as AmerenUE's claim that the agreement was dependent on the Metro East transfer, the Commission agreed to rehear the current proceeding for the purpose of reviewing the effect of the Noranda agreement on the benefits and detriments of the Metro East transfer.

² As reflected below, AmerenUE's retreat from its litigated position and offer of alternative conditions in the context of a Motion for Rehearing raises significant concerns regarding the violation of the due process rights of the Office of the Public Counsel as well as those of the industrial interveners. The Commission's subsequent refusal to provide these parties the opportunity to engage in discovery or cross-examination regarding these alternative conditions raises significant questions of fairness and due process and erodes at the basic underpinnings of the Commission's practice and procedure. Concerns regarding AmerenUE's conduct in this proceeding is further heightened when one recognizes that such conduct has seemingly become commonplace with AmerenUE. As Staff notes in its Response to AmerenUE's Motion for Rehearing, such tactics are not entirely new for this Company. In fact, Staff notes that the Company has engaged in such Commission negotiations previously in the context of Case No. EO-2002-0351. The Commission should necessarily ask itself if the cost of litigating this entire proceeding could have been lessened or avoided if AmerenUE had been forthcoming with its positions from the very beginning. As Staff notes, AmerenUE's approach should raise questions including "Has AmerenUE now made its best offer to the Commission, and if not, when might AmerenUE make its best offer, and what must occur in order for AmerenUE to make its best offer?"

³ See, Direct Testimony of Craig D. Nelson, Case No. EA-2005-0180, filed December 20, 2004. ("AmerenUE's commitment to being Noranda's electric supplier is conditioned upon AmerenUE completing the transfer of the Metro East service area to AmerenCIPS by June 1, 2005, and completing the transfers of the Kinmundy and Pinckneyville combustion turbine generators ("CTGs") from Ameren Energy Generating Company to AmerenUE by June 1, 2005, as AmerenUE determines to be to its satisfaction and sole discretion." (emphasis added).

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III. PARTIES/STRUCTURE OF THE TRANSACTION/REGULATORY ENVIRONMENT

In order to understand the benefits and detriments arising out of this transaction, it is incumbent to understand: (1) the identity of the parties to the transaction; (2) the jurisdiction and attendant regulatory environment in which each party operates; and (3) the structure of the transaction.

A. Parties:

1. Ameren: a public utility holding company delivering electric and natural gas service to customers in Missouri and Illinois. Ameren conducts its regulated utility business through these subsidiaries: (1) AmerenUE; (2) AmerenCIPS; (3) Central Illinois Light Company (CILCO) and (4) Illinois Power.

2. AmerenUE: a public utility providing rate-regulated electric generation, transmission and distribution services and rate-regulated natural gas distribution services in Missouri and Illinois. Currently, AmerenUE operates approximately 8,300 MW of electric generation situated in Missouri as well as the Venice Combustion Turbines located in Metro East St. Louis, Illinois and the Keokuk generation facilities located in Iowa.

3. AmerenCIPS: a public utility providing rate-regulated electric transmission and distribution service and natural gas service in Illinois. As reflected, below, AmerenCIPS receives all of its electric capacity and energy from Ameren Energy Generating Company through a power supply agreement with an affiliate marketing entity.

4. Ameren Energy Generating Company (AEG): a non rate-regulated exempt wholesale generator. AEG was created on May 1, 2000 to hold all the generating assets previously owned and operated by AmerenCIPS as well as substantially all of the generating assets of CILCO. Currently, AEG owns approximately 4,200 MW of electric capacity. AEG is obligated to supply, through a marketing affiliate, all of the energy and capacity needed by AmerenCIPS for its native load customers. Any power not used by AmerenCIPS is sold, through a marketing affiliate, under various long term wholesale and retail contracts.

5. Ameren Energy Marketing: a non-regulated energy marketer responsible for marketing the energy and capacity owned and operated by AEG.

B. Jurisdictions

The relevant regulatory jurisdictions are Missouri and Illinois. In 1997, Illinois passed the Illinois Electric Service Customer Choice and Rate Relief Law. As designed, this law provides for electric utility restructuring and introduces competition into the retail supply of electric energy in Illinois. As a result of this legislation, Ameren created AEG to hold all the generating assets of AmerenCIPS. Effectively, Illinois ratepayers are permitted to purchase electric energy and capacity from the

cheapest provider. This electricity is then transmitted to the customer using the transmission and distribution assets of the relevant delivery company.⁴

Unlike Illinois, Missouri has not deregulated retail electric service. While Missouri once studied the effects of introducing similar electric restructuring legislation, progress towards a deregulated electric generation market was stalled and derailed by disasters in the experiment with deregulation of electricity in California as well as the collapse of Enron and other electric trading companies. Missouri electric utilities operate under rate base / rate of return regulation. Under this form of regulation, a utility's is allowed to reflect in retail rates its reasonable operating expenses, and is given the opportunity to earn a reasonable rate of return on its electric plant in service.

As a result of the differences in regulatory schemes between Missouri and Illinois, Ameren has an incentive to divert generating costs from AEG to AmerenUE. Such diversion of generating costs provides AmerenUE the opportunity to recover such costs in its Missouri retail rates, and reduces AEG generating costs in Illinois, thereby allowing AEG to better compete and profit against other electric generators in that state. In this way, AEG generating costs, which would otherwise have exceeded the market price for electricity in Illinois and would not have been recoverable, may now be diverted to Missouri and recovered through Missouri retail rates. This diversion of generating costs from Illinois to Missouri reduces AEG's operating costs in Illinois, provides AEG a competitive advantage relative to its Illinois competitors, distorts wholesale competition in Illinois and results in inflated non-regulated profits for the Ameren Illinois affiliates, all at the expense of the Missouri regulated ratepayer.

C. Transaction

As reflected in its application, AmerenUE sought to transfer all of its electric utility service area assets located in the Metro East St. Louis, Illinois, including transmission and distribution plant and customers, as well as any associated liabilities, to its affiliate AmerenCIPS. Additionally, AmerenUE sought to transfer assets and customers related to its provision of gas service in the Metro East Service Area. In consideration of this transfer of assets, AmerenUE would receive payment and a promissory note reflecting net book value of the assets at the time of transfer.

⁴ As indicated, upon the adoption of the Illinois legislation, AmerenCIPS transferred its generating assets to Ameren Energy Generating Company. As a result, AmerenCIPS no longer operates any of its own generation. All electricity provided by AmerenCIPS to its native load customers is provided by AEG or indirectly from AmerenUE through the Joint Dispatch Agreement. Unlike AmerenCIPS, however, AmerenUE has not been required to divest itself of its electric generating assets in Illinois. This difference results from a decision of the Illinois Commerce Commission which recognizes the fact that the overwhelming majority of AmerenUE's operations are in Missouri, for which it is required to maintain adequate electric generation assets.

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Recognizing that AmerenUE would not transfer any generating assets to AmerenCIPS, but instead would continue to operate those facilities primarily for the benefit of the Missouri service territory, AmerenUE claims that Missouri ratepayers would receive the benefit from the additional availability of its low-cost generating facilities. In essence, Missouri ratepayers would now be entitled to receive 6% of the output from the existing AmerenUE generating facilities that was previously allocated to the Illinois service area.

Another essential part of this transaction involves the continued applicability of the Joint Dispatch Agreement ("JDA") executed between AmerenUE and AEG. As envisioned, the JDA would allow for greater efficiencies by allowing AmerenUE and AEG to jointly dispatch their combined generating resources to minimize system production costs. AmerenUE states that the JDA "sets forth detailed guidelines for assignment of energy costs associated with the generation and purchase of electric energy to satisfy AmerenCIPS and AmerenUE's native load and other AEG load obligations, and for assigning costs and revenues associated with certain off-system sales." Most importantly to the discussion of this proceeding, the JDA: (1) allocated revenues derived from off-system sales on the basis of relative load and (2) provided for inter-company transfers of energy to be billed at incremental cost.

IV. CONCERNS ARISING OUT OF TRANSACTION

A. Affiliate Transaction

The most immediate concern that arises upon a reading of the application in this proceeding is that this transaction involves a transfer of assets between two wholly owned subsidiaries of Ameren. Any transaction between two affiliated parties necessarily raises red flags regarding the relative equities of the transaction. Unlike a transaction involving two unaffiliated parties engaged in arms-length negotiations focused upon the interests of their individual shareholders and ratepayers, an affiliate transaction raises concerns that the interests of either affiliate may be subordinated by the overall corporate interest. In the case at hand, AmerenUE has not engaged in legitimate negotiations with a principal focus on the betterment of AmerenUE and its ratepayers. Instead, AmerenUE's interests, as well as that of its ratepayers, are secondary to the overall corporate interest of Ameren. This fact, that Ameren was not concerned with the interests of AmerenUE or its ratepayers is readily apparent in the following exchange:

Q. Is this proposed asset transfer or the proposed transaction with the Metro East Illinois properties, do you believe that it is an arm's length transaction?

A. Clearly in one respect it is arm's length, because you have the Illinois Commerce Commission on one end of the arm and the Missouri Public Service Commission on the other end of the arm, both with conflicting interests, both wanting to make sure the transaction's fair, both keenly interested in the - - in their own retail customers in their state. So from that perspective, I think it is very arm's length.⁵

⁵ Tr. 457.

Clearly, Ameren, during the course of these negotiations, was not concerned with the interests of any specific subsidiary or the retail customers of that subsidiary. Instead, Ameren was focused solely on the overall profitability of the parent company.

Recognizing the undeniable concerns associated with these transactions, the Commission promulgated its affiliate transaction rules in 2000.⁶ As defined in the context of 4 CSR 240-20.015, an "affiliate transaction means any transaction for the provision, purchase or sale of any information, asset, product of service, or portion of any product or service, between a regulated electrical corporation and an affiliated entity" (emphasis added). The rule also provides that:

In transactions that involve the provision of information, assets, goods or services to affiliated entities, the regulated electrical corporation must demonstrate that it –

4. Adequately determined the fair market price of the information, assets, goods or services.⁷

Once determined, the rule provides that the regulated electrical corporation may only transfer these assets to an affiliated entity at the higher of the cost or the market value for such assets.⁸

Despite these clear dictates, AmerenUE attempts to circumvent the rule. Relying solely upon the purpose provision of the rule, AmerenUE argues that the rule only pertains to transactions between regulated and unregulated affiliates. AmerenUE attempts to argue, since AmerenCIPS is a regulated entity, albeit by the utility commission of a different state, that this is a transaction between two regulated electrical utilities and that the purpose provision is not met.

AmerenUE's narrow interpretation of the Commission's affiliate transaction rule is nonsensical and avoids the obvious applicability of the rule. First, the definition of "affiliate transaction" clearly indicates that it involves any transaction "between a regulated electrical corporation and an affiliated entity". Nothing in this definition limits the affiliate entity to nonregulated affiliated entities. Second, AmerenUE's interpretation of the rule (that a transaction with AmerenCIPS is not covered because AmerenCIPS is a regulated entity) is nonsensical because AmerenCIPS is not a regulated entity according to the rule's definitions: "regulated electrical corporation" means "every electrical corporation as defined in Section 386.020, RSMo, subject to commission regulation pursuant to Chapter 393, RSMo." It defies any semblance of logic for AmerenUE to claim that AmerenCIPS constitutes a "regulated electrical corporation" for purposes of avoiding the dictates of this rule. Clearly, while regulated by the Illinois Commerce Commission, AmerenCIPS is not subject to commission regulation pursuant to Chapter 393, RSMo. Given the shortcomings of AmerenUE's argument, it is undeniable that this transaction falls within the strictures of the Commission's affiliate transaction rule.

⁶ See, 4 CSR 240-20.015 and 4 CSR 240-40.015.

⁷ See, 4 CSR 240-20.015(3)(C).

⁸ See, 4 CSR-240-20.015(2)(A)(2).

Although the affiliate transaction rule is applicable and requires that any transfer of assets be at the greater of cost or fair market price, AmerenUE notes that it is incapable of demonstrating that it meets this requirement. As AmerenUE points out in its Application, Ameren “does not intend to engage in an arms’ length transaction which would create a market value.”⁹ The failure, by AmerenUE, to deduce a fair market value for the Metro East service territory prior to transferring to an affiliate entity is a direct violation of the Commission’s rule and renders a thorough benefit analysis virtually impossible. While the immediate impact of a failure to pay for the value of this portion of AmerenUE’s business may not be clear, the importance of cash to the overall health of a company and its ability to make investments is often argued to the Commission by regulated utilities including AmerenUE. Furthermore, the Commission itself by the decision of the majority has ignored its own rule without explanation in coming to its decision.

Nevertheless, despite AmerenUE’s refusal to ascertain the fair market value of the Metro East service area, one shortcoming of the transaction is readily apparent. While AmerenUE notes that it is transferring the hard assets, primarily the Metro East transmission and distribution network, at net book value, not only does it fail to receive any compensation for the transfer of the customers located in Metro East and currently served by AmerenUE, it hypocritically argues on one hand that the elimination of Metro East load is good for Missouri ratepayers and, in a separate case yet to be heard, argues that the acquisition of the Noranda load is also good for Missouri ratepayers. The value of such industrial customers is reflected in the testimony filed by AmerenUE in the related Noranda application.¹⁰ In that docket, AmerenUE claims that adding Noranda as a regulated utility customer results in a \$2 to \$3/MWh cost savings. This cost savings primarily results from the addition of a 470 MWs of load with an overall load factor of 98%. As AmerenUE witness Voytas points out:

This means that Noranda takes as much energy off-peak as it does on-peak. Off-peak generation costs are less than on-peak generation costs so selling this off-peak power to Noranda, some of which simply could not be sold off-system at all, generates margins for AmerenUE (and for its customers in the form of a lowered revenue requirement) that would not exist without Noranda. Thus, AmerenUE’s overall native load variable production costs decrease on a \$/MWh basis. The second factor concerns the embedded cost calculation. The addition of the almost 100% load factor Noranda load means that there are more MWh sales over which to spread embedded or fixed costs thereby decreasing the embedded costs on a \$/MWh basis.¹¹

⁹ Application for Transfer of Assets, Change in Decommissioning Trust Fund, Waiver of Affiliate Rules, and Motion for Expedited Treatment, filed August 25, 2003, at page 8.

¹⁰ Case No. EA-2005-0180.

¹¹ See, Voytas Direct at page 22, Case No. EA-2005-0180, filed December 20, 2004.

While AmerenUE is seemingly capable of understanding the value of a high load factor customer in the context of the Noranda Application, it was apparently incapable of understanding the attendant value of the Metro East load in the context of its “negotiations” in the current transaction. Evidence clearly indicates that AmerenUE’s overall load factor is 53%. In light of this load factor and the apparent value placed by AmerenUE on the addition of electric load with high load factors, it is puzzling that AmerenUE would in essence give away the 597 MW Metro East load with a 79% load factor. Clearly, if the Noranda load will “generate margins for AmerenUE (and for its customers in the form of a lowered revenue requirement)”, it is logical to assume the 597 MW Metro East load with a 79% load factor may also generate margins for AmerenUE and its customers. AmerenUE’s representation to this Commission that eliminating the high load factor Metro East load is beneficial to AmerenUE and its ratepayers, while simultaneously arguing that adding the high load factor Noranda load is also good for AmerenUE and its ratepayers is illogical and disingenuous.

On February 7, 2004, Staff filed a pleading designed to analyze the relative production costs for AmerenUE assuming four different scenarios:

1. No Metro East Transfer / No Noranda Load;
2. No Metro East Transfer / Yes Noranda Load;
3. Yes Metro East Transfer / No Noranda Load; and
4. Yes Metro East Transfer / Yes Noranda Load.

This analysis indicates that AmerenUE should be essentially neutral towards the transfer of the Metro East load to AmerenCIPS. That is to say, given the approved methodology of allocating profits from off-system sales, AmerenUE’s production costs are essentially the same with or without the transfer (\$58.93 / MWh without the transfer and \$58.82 with the transfer). Nevertheless, despite this quantification of AmerenUE’s costs, this analysis does not attempt to quantify the value of this transaction to AmerenCIPS or another entity negotiating at an arms-length basis; value that may have resulted in significant compensation to AmerenUE and its ratepayers. This value would only have become apparent if AmerenUE had attempted to deduce the fair market value of the Metro East assets and customers.

B. Joint Dispatch Agreement

During the course of completing the merger of Union Electric Company and Central Illinois Public Service Company (CIPSCO), a Joint Dispatch Agreement was executed. As initially envisioned at the time of the merger, the JDA would allow the generating resources of both entities to be committed and dispatched to jointly serve the native loads of both entities. “Thus, each hour, the actual generation of each entity will only match its respective load by chance, with the most likely outcome being the transfer of energy from one entity to meet the load of the other entity.”¹² In this way, generating cost savings are created for the merged entity.

¹² Proctor Rebuttal at page 14.

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Recognizing that the generating assets of both Union Electric, operating primarily in Missouri, and CIPSCO, operating in Illinois, were fully regulated at the time of the merger, the initial JDA established that all transferred energy should be priced at the incremental cost of generating.

Approximately three years later, following the passage of the Illinois electric utility restructuring legislation, AmerenCIPS sought to transfer all of its generating assets to a rate deregulated exempt wholesale generator, Ameren Energy Generating Company (AEG). Understanding that the JDA governed the generating assets sought to be transferred by AmerenCIPS, Ameren sought to substitute AEG for AmerenCIPS in the JDA. Furthermore, in its effort to meet the federal public interest test required for the transfer of regulated generating assets to an exempt wholesale generator, Ameren claimed numerous benefits of the transfer. Interestingly, in its Order, the Missouri Commission notes that the JDA would “make significant additional generating **capacity** available to UE’s customers without adding corresponding construction costs to the rate base”.¹³

The JDA currently provides for: (1) the allocation of profits from off-system sales on the basis of relative loads and (2) the pricing of intercompany transfers of energy at incremental cost. As a result of these two provisions, the JDA has a negative effect on the economics of the proposed Metro East transfer. As Staff Witness Dr. Proctor notes:

The JDA has a significant impact on the economics of the proposed Metro East transfer. As a part of the transfer of the Metro East assets to AmerenCIPS, the Metro East load will also be transferred to AEM (Ameren Energy Marketing). Under the current JDA, the joint unit commitment and dispatch will remain unchanged. However, the native loads for AmerenUE and AEM will change. AmerenUE’s native load will decrease and AEM’s native load will increase by the amount of the Metro East load. Thus, the transfer of energy from AmerenUE’s generating resources to serve AEM’s load will increase and the amount of energy from AEG’s resources to serve AmerenUE’s load will decrease. In addition, the amount of profits from off-system sales going to AmerenUE will decrease and the amount of profits from off-system sales going to AEM will increase because of the change in native loads.¹⁴

¹³ *In re Application of Union Electric Company, d/b/a AmerenUE, for Approval of the Transfer of Generating Assets by an Affiliate to another Affiliate*, Case No. EA-2000-37, Order Approving Unanimous Stipulation and Agreement, Making Findings Under the Public Utilities Holding Company Act, and Closing Case, at page 4 (emphasis added). The Commission’s reference in that Order to the availability of additional generating capacity through the JDA is particularly important given AmerenUE’s claims that it does not have sufficient capacity to serve both the Metro East and Noranda loads. Furthermore, despite the availability to AmerenUE of additional AEG generation through the JDA, as professed in this Order, AmerenUE now claims that this capacity is not available to AmerenUE through the JDA.

¹⁴ Proctor Rebuttal at 15.

In order to eliminate the negative impact of the JDA on the Metro East transfer, the Staff proposed two amendments. First, Staff proposed that the JDA be amended to provide for the allocation of profits from off-system sales on the basis of generation rather than respective shares of native load. This proposed amendment was agreed to by AmerenUE and ordered by the Commission in both the original Report and Order as well as in the majority's recent opinion. Second, and of greater disagreement, is Staff's suggestion that the JDA also be amended to reflect the pricing of energy transfers at market price rather than incremental cost. As Staff Witness Dr. Proctor notes:

The current pricing of energy transfers at incremental cost instead of market price is detrimental to the Metro East transfer in that all of the Metro East load that is currently being served by AmerenUE generation would continue to be served by AmerenUE generation at incremental cost. Thus, AmerenUE generation that is released by the transfer would not be able to be sold into the spot market at competitive prices, but would instead be sold to AEM at below market price. The energy transfer is approximately 4 million megawatt-hours per year, and at a difference between market price and incremental cost of only \$2.5 per megawatt-hour, the difference is \$10 million per year.¹⁵

Unlike the first proposed JDA amendment, Staff's proposal to modify the pricing of intercompany transfers of energy resulted in great resistance. Noticeably, while AmerenUE was vociferous in its opposition to the amendment, its position was lacking in substance. Rather, than providing the Commission with evidence supporting the need for pricing intercompany transfers on the basis of incremental costs, AmerenUE simply took the position that this question should be ignored until a future rate proceeding. Ameren also asserted the difficulty of ascertaining market price absent the commencement of MISO energy markets.¹⁶

AmerenUE's inability to provide such a substantive rationale is not surprising given AmerenUE's position regarding other issues in this proceeding. In its testimony before this Commission, the Office of the Public Counsel (OPC) has repeatedly alleged that AmerenUE's production cost modeling is deficient because it fails to reflect the continuing availability of 400 MW of capacity and energy associated with the Electric Energy, Inc. Joppa generating facility beyond the current December 2005 expiration date.¹⁷ OPC claims that AmerenUE and its ratepayers are entitled to a portion of the low cost power generated by this facility beyond the

¹⁵ Id. at 16.

¹⁶ Nelson Surrebuttal at pages 5-12; Voytas Surrebuttal at page 5.

¹⁷ Electric Energy, Inc. is a 60%-owned subsidiary of Ameren Corporation, which is 40% owned by AmerenUE and 20% owned by another Ameren subsidiary. EEI operates electric generation and transmission facilities in Illinois. Most specific to the current proceeding, EEI operates the Joppa facility, a low cost generating facility located in southern Illinois.

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expiration of the current electric supply agreement. Despite its inability to see the inequity in the JDA's current methodology for transferring energy on the basis of incremental cost, AmerenUE attacks OPC for its desire to have energy from the EEI Joppa facility made available on a similar basis. Specifically, AmerenUE argues against OPC's position in its Reply Brief.

Make no mistake, OPC wants that power at the lower of cost or market. . . . As Mr. Nelson suspected, OPC's Protest at FERC confirms that OPC has absolutely no intention of ever supporting a waiver of the affiliate transaction rules that might allow EE Inc. and AmerenUE to arrive at a fair deal for power. . . . In short, OPC (and apparently Staff, now having jumped on this bandwagon contrary to Dr. Proctor's sworn testimony) is never going to support a waiver of the affiliate transaction rules and wants this power at cost. In the end, though, EE Inc. will not sell power to AmerenUE at cost.¹⁸

AmerenUE also notes that it is unlikely that FERC would ever approve a contract that provided for the transfer of energy on the basis of incremental cost.¹⁹

Given AmerenUE's inconsistent positions on the pricing of energy sold to AmerenUE from EEI Joppa versus that sold by AmerenUE to AEG, it is apparent that AmerenUE's real interest is in gaining a better competitive advantage for its deregulated generating operations (AEG and EEI Joppa). By allowing AEG to purchase energy at incremental cost, Ameren is able to place AEG at a competitive advantage *vis a vis* its wholesale competitors, thereby distorting the wholesale electric generation markets

As in any competitive market, the entities in the wholesale electric generation market are only able to price at the market clearing price. In order to assure long-term viability, competitors must be able to recover, out of the market price, all of their variable cost as well as some contribution to their fixed costs. If the market price does not allow an entity to recover a contribution towards its fixed costs, that entity will ultimately be faced with making significant write-offs to the asset value of these assets.²⁰

Against this reality of a competitive wholesale market, Ameren seeks to introduce a competitor that has a completely different cost profile. Rather than pricing based upon some contribution towards fixed cost, Ameren seeks to have AEG enter the competition with some of its power obtained at Ameren UE's incremental cost. This competitive advantage allows AEG to either inflate overall corporate profits or to engage in predatory pricing.

¹⁸ AmerenUE Reply Brief at pages 33-34, See also Tr. 1925 ("The EEInc., the nature of its business is such, as an exempt wholesale generator, that it's not interested in selling power at incremental cost.").

¹⁹ Id. at 35.

²⁰ This competitive reality is best demonstrated by the action of certain long-distance companies in response to the price advantage gained by new competitors providing service based upon the economies of an all-fiber network. Recognizing that it would no longer be able to recover a contribution towards fixed costs associated with an older, inefficient network, companies such as AT&T were faced with huge asset write-offs.

Ameren's need to provide this competitive advantage for AEG is readily apparent through a reading of its 2003 SEC 10K annual report (Ex. 58).

Costs of Fuel (\$\$ per MMBtu)	2003	2002	2001
AmerenUE	\$.822	\$.813	\$.867
AEG	\$1.368	\$1.452	\$1.421

As reflected in that document, AEG incurs incremental costs that have ranged from 63.9% to 78.6% higher than those incurred by AmerenUE. There is no question that AEG's ability to access the lower cost AmerenUE generation provides it a competitive advantage and thereby distorts the wholesale electricity market.²¹ The fundamental remaining issue is, given AmerenUE's acknowledgement that the FERC would never allow it to enter into a wholesale agreement that provides for the delivery of energy from Joppa unit at incremental cost, why would FERC, if provided the opportunity to review the JDA, allow for the continued existence of a Joint Dispatch Agreement that provides for similar incremental pricing?

C. Shift of Burden for Environmental Liabilities

The failure of AmerenUE to engage in an arms-length transaction also resulted in another detriment to Missouri ratepayers as a result of the Metro East transfer. As discussed in Staff's testimony, in the course of negotiating this transaction, AmerenUE reviewed each environmental liability and "assigned those liabilities based on whether the liability arose due to the generation function, or as a result of the transmission function or distribution function of AmerenUE. If the AmerenUE liability was assigned to generation, those liabilities would continue on AmerenUE's books. . . . AmerenUE's analysis produced no assignment of any liability to AmerenCIPS from the electric operations of AmerenUE."²² Since these generation facilities were providing energy to both the Missouri and Illinois retail jurisdictions, it is fundamentally unfair that these pre-closing environmental costs would be retained by AmerenUE, operating now as solely as Missouri utility, with no compensation from the Illinois ratepayers that benefited from such pre-closing activities and no protection of Missouri ratepayers from these liabilities.

Recently, AmerenUE has been heard to recite the values of a "cost causer – rate payer" method of establishing rates on the question of using an accrual method versus a cash method of recovering the cost of removal of retired assets.

²¹ The ability of a firm to use a cost advantage, real or otherwise, to distort a competitive market was recently displayed in the telecommunications industry. Due to its policy of incorrectly capitalizing certain costs, WorldCom was able to offer a lower price relative to its competitors while simultaneously giving the financial community the impression that it was also recovering its costs. In response, AT&T, Sprint and other competitors were required to meet WorldCom's lower, distorted price. Given that these competitors were still using appropriate accounting methodologies, the drop in prices resulted in significant reductions to the net income figures for these competitors. As a result, stock prices for these competitors dropped significantly.

²² Meyer Rebuttal at page 13.

AmerenUE insisted that those that benefit from an asset should also be responsible for all the costs associated with that asset.²³ Despite AmerenUE's stated affinity for the "cost causer – rate payer" methodology, it inexplicably rejected application of this same methodology in this proceeding.

The environmental liability issue concerns the compensation for pre-closing environmental costs, primarily asbestos-related claims, that resulted from generation units operated for the benefit of both Missouri and Illinois ratepayers. Rather than assigning the allocable share of those pre-closing liabilities to the Illinois ratepayers that benefited from the service, AmerenUE seeks to transfer this Illinois portion of the pre-closing liabilities to the Missouri retail jurisdiction. Although the final amount may not be known for years, the fact that Ameren disclosed the liabilities in its 10K (Ex. 58) indicates Ameren management's belief that such costs could be material to the Ameren shareholders.²⁴

Ameren's position in this proceeding, in which the Illinois portion of the pre-closing liabilities are being transferred, is in stark contrast to its position taken in prior matters in which such pre-closing liabilities are retained by the original liable party. Ameren's 10K notes the following general discussion regarding environmental cleanup liabilities:

We are involved in a number of remediation actions to clean up hazardous waste sites as required by federal and state law. Such statutes require that responsible parties fund remediation actions regardless of fault, legality of original disposal, or ownership of a disposal site. UE and CIPS have been identified by the federal or state government as a potentially responsible party at several contaminated sites. Several of these sites involve facilities that were transferred by CIPS to Genco in May 2000 and were transferred by CILCO to AERG in October 2003. At part of each transfer, the transferor (CIPS or CILCO) has contractually agreed to indemnify the transferee (Genco or AERG) for remediation costs associated with pre-existing environmental contamination at the transferred sites.²⁵

Specifically in regard to Ameren's asbestos-related litigation, Ameren notes:

²³ See, Post Hearing Brief of Union Electric Company d/b/a AmerenUE, Case No. GR-99-315, at page 35. ("The standard approach accomplishes intergenerational equity by ratably allocating the entire cost of the assets that are serving customers, including a ratable share of the net salvage costs for those assets, to those same customers." (emphasis added)).

²⁴ Securities and Exchange Commission Release Nos. 33-8040, 34-45149; FR-60. "Our rules governing Management's Discussion and Analysis ("MD&A") currently require disclosure about trends, events or uncertainties known to management that would have a material impact on reported financial information." (emphasis added). "The underlying purpose of MD&A is to provide investors with 'information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations.'"

²⁵ Ex. 58, 10-K filing for Ameren Corp dated March 9, 2004, at page 166. (emphasis added).

The claims filed against Ameren, UE, CIPS, Genco and CILCO allege injury from asbestos exposure during the plaintiff's activities at our electric generating plants. In the case of CIPS, its former plants are now owned by Genco, and in the case of CILCO, most of its former plants are now owned by AERG. As part of the transfer of ownership of the generating plants, the transferor (CIPS or CILCO) has contractually agreed to indemnify the transferee (Genco or AERG) for liabilities associated with asbestos-related claims arising from activities prior to the transfer.²⁶

Had AmerenUE engaged in actual arms length negotiations, compensation for these pre-closing liabilities would have been recognized and addressed. As Staff notes, "[i]n an arms length transaction, AmerenUE would have insisted on some form of payment at closing from AmerenCIPS to cover their portion of the liabilities with an agreement between AmerenUE and AmerenCIPS about the allocation of costs between the two companies if those liabilities become payable in the future."²⁷

V. CONDITIONS

In response to the overwhelming evidence indicating that this transaction will result in: (1) a transfer of assets to an affiliate at less than fair market value, in contravention of the Commission's affiliate transaction rules; (2) a shift in electric generation costs from AEG to AmerenUE under the provisions of the JDA; and (3) a shift in pre-closing liabilities from Illinois ratepayers to Missouri ratepayers, a unanimous Commission originally suggested numerous conditions that it asserted would protect the Missouri ratepayers from net detrimental effects of this transaction. Two of these conditions required AmerenUE to: (1) amend the JDA to provide for market pricing for all intercompany transfers of energy and (2) hold Missouri ratepayers harmless for the Illinois allocated portion of any liabilities realized in the future associated with pre-closing generation activities undertaken for the benefit of Missouri and Illinois ratepayers.

Without any due process safeguards or any evidentiary support in the record, the majority in its Report and Order on Rehearing made a complete about face and instead adopted AmerenUE's alternative conditions. These alternative conditions, proposed by an Applicant which has acknowledged that it has never really considered the impact on ratepayers and would rely upon the Commission to provide such protections, would allow AmerenUE to: (1) maintain the incremental pricing for intercompany transfers of energy and (2) shift pre-closing liabilities to Missouri ratepayers, if AmerenUE shows, in a future rate proceeding that benefits associated with this transaction outweighs these acknowledged detriments.

The majority's acceptance of the alternative conditions significantly lessens Missouri ratepayer protections. First, the majority relies upon the flawed assumption that savings from a merger or other transaction may somehow be tracked. Such

²⁶ Id. at page 168 (emphasis added).

²⁷ Meyer Rebuttal at pages 13-14.

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tracking is somewhat akin to the angel's ability, in the movie *It's A Wonderful Life*, to demonstrate how the world would have been different absent a particular event; such an assumption is based upon the mistaken belief that the post-transaction company can realistically ascertain how the world would have been had the company not proceeded with a particular transaction. Once understood, the costs for this fictitious company are then compared to actual costs and savings calculated. Such discussions border on the absolute limits of speculation.

In fact, approximately 15 years ago the Commission invited a merging entity to track merger savings in an effort to allow that Company to share in any recognized savings. The Commission recognized the tall task in front of the utility. Ultimately, the Commission noted:

Staff has persuasively argued that KPL has a strong incentive to view savings as merger-related even if they are not and to classify them in the CSTS (cost savings tracking system) so as to increase the pool of savings subject to the sharing plan. Staff demonstrated several flaws in the CSTS which could allow nonmerger savings to seep into the pool of savings to be shared. . . . The Commission is not convinced that KPL's tracking plan will exclude all nonmerger savings from the pool of merger savings to be shared.²⁸

As recognized by Commissioner Mueller in his separate opinion:

I do not believe that it is possible to make the merger savings tracking plan (MSTP) foolproof. It will be in the interest of KPL to classify as many savings as possible as being the result of the merger even though they might have occurred without the merger. Even the most competent auditor will not be able to find and exclude all such instances of mischaracterization. Therefore, I believe that savings which would have occurred without the merger will be included in the MSTP to be shared with the stockholders.

Second, the conditions offered by AmerenUE and adopted by the majority guarantees continues needless litigation in the future over: (1) the detriment suffered by the Missouri ratepayers in the form of increased exposure to environmental liabilities as well as the costs associated with subsidizing AEG through the JDA and (2) the speculative benefits which have occurred as a result of the transaction. The encouragement of such ongoing litigation in the face of such obvious detriments is worrisome.

Finally, the majority's adoption of the Company's alternative conditions is inherently inequitable. In essence, the majority allows AmerenUE to take advantage of future benefits, either not known or not quantified at this point in time, and use them to justify the imposition of detriments on Missouri ratepayers, specifically

²⁸ *In re Kansas Power & Light Company for authority to merge with Kansas Gas & Electric*, Case No. EM-91-213, 1 MoPSC 3d 150, 156-157, issued September 24, 1991.

detriments associated with the increased allocation of liabilities as well as those from the JDA. In essence, the majority has presented the Company a “no lose situation” by allowing it to later justify the detrimental aspects of this transfer.

Noticeably, the majority was not willing to provide the Missouri ratepayers a similar “no lose situation”. During a recent on-the-record presentation, I specifically asked the Company whether it would be willing to shield ratepayers from the appearance of unknown detriments just as it is willing to gain from the appearance of unknown benefits.

Q. [I]f your modeling is wrong on what you're assessing your benefits to be going forward, and ultimately we find in rate cases coming up that looking at the whole transfer, that the benefits weren't really as great as what you anticipated, and the detriments exceed - - not just the ones from the liabilities, but the detriments actually exceed the benefits, is Ameren willing to accept the condition that they will pick up all of those detriments as they're measured and as they're incurred going forward to be determined in the future whenever we get to those rate cases?

A. I think the short answer to your question is we're not prepared to make that kind of commitment.²⁹

In conclusion, I find it particularly worrisome that the majority has adopted “customer protection” conditions offered by a Company that has admitted that it never focused on the need to protect the ratepayer, and that, instead, has insisted that any customer protection role should be necessarily shouldered by this Commission.

VI. DENIAL OF DUE PROCESS

The original Report and Order set forth conditions designed to prevent certain detriments which otherwise caused the transfer to not pass the “not detrimental to the public interest” standard.³⁰ At the same time as it created an undercurrent of threats regarding the transfer of the Pinckneyville and Kinmundy units as well as the performance of the Noranda contract, AmerenUE also proposed alternative conditions which it claims would “allow the Company to complete the transfer of the Metro East load as well as the transfer of the Pinckneyville and Kinmundy CTGs to AmerenUE” as well as, presumably, the performance of the Noranda energy contract.³¹

AmerenUE's request for rehearing was a retreat from its litigated position. As such it proposed alternative conditions that were not litigated or discussed in the original hearing. As Staff noted in its Response to the Motion for Rehearing,

²⁹ Tr. 1928-1929.

³⁰ *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. 1934) (citing to *Electrical Public Utilities Co. v. West*, 140 Atl. 840 (Md. 1928)).

³¹ AmerenUE's Application for Rehearing and Alternative Motion for Clarification of the Commission's Order of October 6, 2004, at page 7.

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"[p]utting aside these questions of tactics and strategy, the Commission must address the legal questions regarding the procedure it should / must follow if it wants to consider new proposals from AmerenUE."³² Relying upon several recent court decisions, the Staff states that "if the Commission has any interest in pursuing adoption of these conditions that AmerenUE raised in its Application for Rehearing and Alternative Motion, the Commission needs an evidentiary basis for doing so constituting competent and substantial evidence upon the whole record. . . [T]he Commission needs to establish a procedural schedule which would include adequate time for prefiled testimony, discovery, a hearing and briefs."³³

In addition to Staff's pleading, the Commission's rules also establish sufficient basis for the Commission to have engaged in additional due process. Commission Rule 4 CSR 240-3.110 provides the filing requirements for an Electric Utility seeking to sell, assign, lease or transfer assets. In addition to other requirements, that rule requires the applicant to include a statement regarding "the reasons the proposed sale of the assets is not detrimental to the public interest."

By allowing AmerenUE to engage in substantive changes to its litigated position in the context of its Motion for Rehearing, the Commission has essentially ignored the requirements of its own rules. The previously cited Commission filing rule as well as the Commission's rules of practice and procedure clearly contemplate a thorough application identifying the reasons the proposed sale of assets is not detrimental to the public interest. The disclosures contained in the application should then be subjected to discovery, as contemplated by 4 CSR 240-2.090, presentation of evidence with attendant cross examination, as contemplated by 4 CSR 240-2.110 and 2.130, and briefs or oral arguments, as contemplated in 4 CSR 240-2.140.

Instead of undertaking the procedure contemplated by its Rules of Practice and Procedure, the Commission merely requested certain filings, none of which were actually received into the evidentiary record, and held an on-the-record conference, at which none of the parties were allowed to engage in cross-examination of the Company's witness regarding the revised Application. By allowing AmerenUE to make wholesale changes to its Application without also providing sufficient procedural safeguards for the other parties to challenge the appropriateness of the new changes, the Commission has significantly undermined the due process rights of all parties. Moreover, given the lack of evidentiary foundation for AmerenUE's revised Application, the Commission's Report and Order on Rehearing suffers from fatal flaws.

VII. CONCLUSION

This dissenting opinion provides detailed discussion of deficiencies in the Report and Order on Rehearing. Briefly, I believe that the majority's decision: (1) fails to provide for adequate due process for parties; (2) fails to rely upon competent

³² Staff Response to AmerenUE's Application for Rehearing and Alternative Motion and Public Counsel's Application for Rehearing, at pages 8-9.

³³ Id. at page 9.

and substantial evidence in the evidentiary record; (3) runs afoul of the Commission's affiliate transaction rules; and (4) encourages an environment where utilities are free to dictate policy to the Commission.

While general discussion of such shortcomings may be fine for academic discussions, the practical matter is that the majority's decision potentially has a negative effect on AmerenUE ratepayers. The information contained in the latest Staff pleading indicates that, given the current structure of the JDA, "that the Metro East transfer is not economic."³⁴ Staff's analyses indicate that, absent any conditions, the proposed Metro East transfer may result in an annual detriment of over \$31 million to AmerenUE shareholders. Even with the limited conditions offered by AmerenUE and agreed to by the Commission, I believe that this transaction viewed alone will most likely have a negative effect on all Missouri ratepayers (residential, commercial and even those industrial ratepayers represented in the two intervenor groups). Sadly, the only winners in the majority's decision are the Ameren shareholders.

**In the Matter of the Application of Union Electric Company,
Doing Business as AmerenUE, for an Order Authorizing the
Sale, Transfer and Assignment of Certain Assets, Real
Estate, Leased Property, Easements and Contractual Agree-
ments to Central Illinois Public Service Company, Doing
Business as AmerenCIPS, and, in Connection Therewith,
Certain Other Related Transactions.**

Case No. EO-2004-0108

Decided March 10, 2005

**ORDER DENYING APPLICATION FOR REHEARING
AND GRANTING MOTION FOR CLARIFICATION**

On February 18, 2005, the Office of the Public Counsel filed its Second Application for Rehearing. Pursuant to Section 386.500, RSMo 2000, the Commission shall grant a rehearing if in its judgment there is sufficient reason to do so. Public Counsel has not provided sufficient reason for the Commission to grant a rehearing, and the Commission will deny the application for rehearing.

Also on February 18, Union Electric Company d/b/a AmerenUE filed a motion for clarification. AmerenUE states that it believes it will be impossible to timely receive all necessary regulatory approvals for the changes to the Joint Dispatch Agreement (JDA) required in the Report and Order on Remand. The Report and Order on Remand, at Ordered Paragraph 4, required AmerenUE to "amend its [JDA] to provide that profits from off-system sales are shared on the basis of generation output rather than based on load."

³⁴ Staff Response to AmerenUE Filings, dated February 7, 2004, at page 11.

AmerenUE states that it has a deadline of April 22, 2005, pursuant to its contract with Noranda Aluminum, Inc., by which it must advise Noranda whether or not it will be able to serve Noranda's load pursuant to that contract. AmerenUE also states that the contract provides that service to Noranda will begin on June 1, 2005, if the Commission grants approval in Case No. EA-2005-0180. AmerenUE does not believe that it will receive all necessary approvals for amending the JDA in time to meet those dates.

The Report and Order on Remand does not explicitly require that modifications to the JDA gain all necessary approvals and be implemented before the transaction closes. It requires the JDA amendments, and authorizes the Metro East transfer, but does not require that the latter be completed before the former can take place. AmerenUE asks that the Commission clarify that the Report and Order on Remand allows it to proceed with closing the Metro East transfer, even though all regulatory approvals have not been granted, and the modifications to the JDA have not been implemented. AmerenUE also states, that for ratemaking purposes in future rate cases, the Commission should deem the first JDA amendment to have been made by the AmerenUE as of the date the Metro East transfer is closed. AmerenUE states that it is willing to quantify and maintain accounting records of the impact the first JDA amendment would have had if it would have been in effect on the date of the Metro East transfer.

On March 9, 2005, in response to a Commission order, AmerenUE provided additional information about the process of modifying the JDA. AmerenUE stated that the only regulatory approval required would be from the Federal Energy Regulatory Commission (FERC), that AmerenUE had not yet applied to the FERC for approval, and that it could not make any valid prediction of the amount of time it might take to obtain approval from the FERC.

No party responded to AmerenUE's motion for clarification. The request is reasonable, since Missouri ratepayers are completely protected even if the FERC does not approve the JDA amendment, or if approval is delayed until after AmerenUE rates are changed in a future proceeding. The Commission will grant AmerenUE's motion for clarification.

IT IS THEREFORE ORDERED:

1. That the application for rehearing filed by the Office of the Public Counsel on February 18, 2005, is denied.
 2. That the Motion for Clarification filed by Union Electric Company d/b/a AmerenUE on February 18, 2005, is granted, and Union Electric Company d/b/a AmerenUE shall quantify and maintain accounting records of the impact the first Joint Dispatch Agreement amendment would have had if the amendment had been in effect on the date of the Metro East transfer.
 3. That this order shall become effective on March 10, 2005.
- Davis, Ch., Murray and Appling, CC., concur
Gaw and Clayton, CC., dissent

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of the Future Supply, Delivery and Pricing of the
Electric Service Provided by Kansas City Power & Light
Company.***

*Case No. EW-2004-0596
Decided February 18, 2005*

Electric §1. The Commission opened an investigative case in which interested parties discussed Kansas City Power and Light Company's resource needs and plans. Once the general discussion shifted to settlement discussions, the Commission closed the case as no Commission action was anticipated. The Commission noted that if the company develops a regulatory plan for which it wants the Commission's approval, it can request that approval in a new case.

Evidence, Practice and Procedure §30. In an uncontested/investigative case in which no Commission action was anticipated, the Commission closed the case once the general discussion between participants shifted to settlement discussions.

ORDER CLOSING CASE

The Commission opened this case on June 3, 2004. It was docketed as an "EW" case, meaning that it is not a contested case, there are no "parties" as that term is normally used, there are no ex parte restrictions, and no specific Commission action was anticipated. For the last eight months, interested entities have participated in this case, sharing information and discussing Kansas City Power & Light Company's resource needs and plans. Recently the focus has moved from general discussion to attempting to reach a consensus among all the participants.

On January 18, 2005, Praxair, Inc., filed a motion to close this case. Praxair notes that settlement documents have recently been circulating, and that the investigation function of this case has been concluded. A number of the participants responded to Praxair's motion, and none oppose closing this case. All participants agree that the process has been worthwhile.

The Commission agrees that it is time to close this case. It appears that the general discussion has led to the specific give-and-take of settlement-style negotiations. If KCPL develops a regulatory plan (with or without consensus) for which it wants Commission approval, it can request that approval in a new case.

IT IS THEREFORE ORDERED:

1. That this case is closed.
2. That all motions not previously ruled upon are denied.
3. That this order shall become effective on February 28, 2005.

Lewis Mills, Deputy Chief Regulatory Law
Judge, by delegation of authority pursuant
to Section 386.240, RSMo 2000.

* See pages 568 and 608 for orders *In the Matter of a Proposed Experimental Regulatory Plan for Kansas City Power & Light*, Case No. EO-2005-0329.

In the Matter of the Determination of Prices, Terms, and Conditions of Line Splitting and Line Sharing.

Case No. TO-2001-440
Decided March 1, 2005

Telecommunications §1. The Commission granted a motion to dismiss the case given the imminent expiration of the M2A, the *de minimis* volumes of HFPL (high frequency portion of the loop) traffic under the current M2A, and the fact that the bulk of the orders for HFPL were issued under non M2A agreements.

ORDER GRANTING MOTION TO DISMISS AND CLOSING CASE

On January 26, 2005, the Commission held a posthearing conference in this case. Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, the Commission's Staff, and Covad Communications Company were present at the conference. During the conference, SBC Missouri made an oral motion that the Commission close case, given the imminent expiration of the M2A, the *de minimis* volumes of HFPL (high frequency portion of the loop) traffic under the current M2A, and the fact that the bulk of the orders for HFPL were issued under non-M2A agreements. Covad and Staff supported the motion.

The Commission subsequently issued an order regarding the motion to dismiss, directing interested parties to respond no later than February 16, 2005. No responses were received by the Commission.

The Commission has reviewed the motion to dismiss and finds that it is reasonable and should be granted.

IT IS THEREFORE ORDERED:

1. That the motion to dismiss, offered by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, during the January 26, 2005 posthearing conference, is granted and this case is hereby dismissed.
2. That this order shall become effective on March 11, 2005.
3. That this case may be closed on March 12, 2005.

Davis, Chm., Gaw, Clayton, and Appling, CC., concur.
Murray, C., absent.

Ruth, Senior Regulatory Law Judge

**In the Matter of the Application of SBC Long Distance, Inc., and
SBC Telecom, Inc., for Authority to Transfer Stock of SBC
Long Distance, Inc., to SBC Telecom, Inc., and Convert SBC
Long Distance, Inc., to a Limited Liability Company**

*Case No. XM-2005-0219
Decided March 1, 2005*

Telecommunications §4. The Commission determined that it does not have jurisdiction to review a sale of the stock of a Missouri telephone company from one out-of-state holding company to another out-of-state holding company.

Telecommunications §4. The Commission determined that it does not need to approve the conversion of a telephone company from a corporation to a limited liability company.

**ORDER APPROVING THE MERGER OF SBC DATACOMM INTO SBC
LONG DISTANCE, AND FINDING NO JURISDICTION TO REVIEW THE
TRANSFER OF SBC LONG DISTANCE'S STOCK**

On January 7, 2005, SBC Long Distance, Inc., and SBC Telecom, Inc., filed a joint application requesting that the Commission either approve, or decline jurisdiction over, a transaction in which the stock of SBC Long Distance would be transferred from SBC Communications Inc., to SBC Telecom, Inc. As part of that transaction, SBC Long Distance is to be converted from a corporation to a limited liability company. The applicants indicate that this proposed transaction is part of a corporate realignment designed to improve the administrative efficiency of SBC and its affiliates. SBC Long Distance is certificated to provide telecommunications services in Missouri.

On February 8, the joint applicants filed a first amended application. The amended application added provisions indicating that SBC DataComm, Inc., another SBC affiliate, would be merged with SBC Long Distance as a part of the previously described transaction. SBC DataComm is not a public utility and does not have a certificate from this Commission.

The Commission's Staff filed its recommendation regarding the amended application on February 22. Staff agrees with the joint applicants that none of the companies involved in the transaction are organized or existing under the laws of Missouri, and thus are not subject to the requirements of Section 392.300.2, RSMo 2000. As a result, the Commission does not have jurisdiction to approve or disapprove the transfer of SBC Long Distance's stock from SBC Communications Inc., to SBC Telecom, Inc. Furthermore, Staff agrees with the joint applicants that the Commission waived application of Section 392.300.2 in the order that granted SBC Long Distance its certificate of service authority.

Staff also agrees with the joint applicants that the Commission does not need to approve the proposed conversion of SBC Long Distance from a corporation to

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a limited liability company. Staff simply requests that the Commission order SBC Long Distance to file a notice of name change when it makes the conversion.

Staff contends that Section 392.300.1, RSMo 2000, requires Commission approval of a transaction involving the merger of a certificated company with any other "corporation, person or public utility." Thus, the Commission's approval would be required before SBC DataComm could be merged with SBC Long Distance. Staff, however, indicates that the merger of SBC DataComm into SBC Long Distance is not detrimental to the public interest. On that basis, the Staff recommends that the Commission approve that merger.

Consistent with the recommendations of its Staff, the Commission finds that it has no jurisdiction to approve or disapprove the transfer of SBC Long Distance's stock from SBC Communications Inc., to SBC Telecom, Inc. In addition, the Commission finds that it does not need to approve the conversion of SBC Long Distance from a corporation to a limited liability company, although SBC Long Distance will be required to notify the Commission of its name change when that conversion is completed. The Commission further finds that the merger of SBC DataComm into SBC Long Distance is not detrimental to the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That SBC Long Distance, Inc., shall inform the Commission of its name change, as provided in Commission Rule 4 SCR 240-2.060(5), upon the completion of its conversion from a corporation to a limited liability company.
2. That the proposed merger of SBC DataComm, Inc., into SBC Long Distance, LLC is approved.
3. That this order shall become effective on March 11, 2005.
4. That this case shall be closed on March 12, 2005.

Davis, Ch., Clayton and Appling, CC., concur
Gaw, C., dissents
Murray, C., absent

Woodruff, Senior Regulatory Law Judge

**In the Matter of an Investigation into Public Utility Emergency
Preparedness.***

*Case No. AO-2002-202
Decided March 1, 2005*

Public Utilities §1. The Commission determined that the case has accomplished its goal of obtaining information from utility companies in Missouri regarding their emergency preparedness. Therefore, the Commission closed the case.

ORDER CLOSING CASE

The Commission issued its Order Establishing Case¹ on October 31, 2001, directing the Commission's Staff to survey Missouri Utilities concerning their preparedness for disaster and emergency situations, including procedures for dealing with terrorist threats or attacks. The Commission accepted the report by order issued January 24, 2002, and directed Staff to prepare and file a follow-up report.

Since the filing of the initial report, Staff has continued to work to obtain survey responses from the nonresponding parties and has filed numerous status reports. Staff's most recent status report, filed October 20, 2004, indicated that Staff has received a survey response from the last remaining entity from whom Staff was expecting a response. Staff notes that this case has accomplished its goal of obtaining information from utility companies in Missouri regarding emergency preparedness.

The Commission has reviewed Staff's status reports, along with the official file, and finds that this case has accomplished its goal of obtaining information from utility companies in Missouri regarding their emergency preparedness. Therefore, this case may now be closed. The Commission directs Staff to continue its regular activities monitoring the safety and emergency planning risks of Missouri utility companies.

IT IS THEREFORE ORDERED:

1. That this order shall become effective on March 11, 2005.
2. That this case may be closed on March 12, 2005.

Davis, Chm., Gaw, Clayton, and Appling, CC., concur.
Murray, C., absent.

Ruth, Senior Regulatory Law Judge

* See page 550, Volume 10, MPSC 3d for the order establishing this case; and pages 96 and 110, Volume 11, MPSC 3d for other orders in this case.

¹ This case was originally opened as OO-2002-202; the case number designation was later changed to AO-2002-202.

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In the Matter of the Application of The Empire District Electric Company for Authorization to Manage Sulfur Dioxide Emission Allowance Inventory.

Case No. EO-2005-0020

Decided March 1, 2005

Accounting §5. The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.

Electric §§32, 44. The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.

Electric §40. The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.

Service §49. The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.

ORDER APPROVING STIPULATION AND AGREEMENT

On July 14, 2004, The Empire District Electric Company filed an application for authority to manage its sulfur dioxide emissions allowance inventory. On January 18, 2005, Empire, the Staff of the Commission, and the Office of the Public Counsel filed a unanimous stipulation and agreement.

The parties agree that Empire should be allowed to manage its sulfur dioxide emissions allowance inventory according to the "SO₂ Allowance Management Policy" attached to the agreement. Empire will submit annual reports to Staff and Public Counsel, and record emissions allowance transactions according to specific accounting guidelines. The parties also agree that any ratemaking treatment will be reserved for future rate cases.

On February 17, 2005, the Staff filed its suggestions in support of the agreement. Staff states that the development of Empire's SO₂ Allowance Management Policy has two benefits: it requires Empire to proactively plan its allowance activity, and it informs Staff and Public Counsel in advance of what that activity will be. Staff recommends that the Commission approve the agreement.

The Commission has considered the application and the unanimous stipulation and agreement, and the Staff Memorandum. The Commission will approve the agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on January 18, 2005, is approved, and the parties shall carry out the terms and requirements therein.
2. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the authorization herein granted.
3. That the Commission reserves the right to consider any ratemaking treatment to be afforded the authorization herein granted in a later proceeding.
4. That this order shall become effective on March 11, 2005.
5. That this case may be closed after March 12, 2005.

Davis, Ch., Gaw, Clayton and Appling, CC., concur
Murray, C., absent

Mills, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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**In the Matter of the Tariff Filings of Sprint Missouri, Inc. d/b/a
Sprint to Modify Rates in Accordance with Sprint's Price Cap
Regulation Pursuant to Section 392.245, RSMo 2000.***

Case No. IT-2004-0134, et al
Decided March 3, 2005

Telecommunications §14. Following a remand from the Circuit Court of Cole County, the Commission adopted the findings of fact and conclusions of law from a related case – TR-2002-251 – as the basis for its decision to permit Sprint to reduce its access service charges, while increasing its basic local service rates, so that both rates would more closely reflect the actual cost of providing those services.

ORDER ON REMAND

On October 2, 2003, the Commission issued an order that approved tariffs submitted by Sprint Missouri, Inc. d/b/a Sprint to revise the company's General Exchange and Access Services tariffs. The Office of the Public Counsel objected, but the tariffs were approved over those objections. Public Counsel appealed the Commission's decision to the Circuit Court of Cole County. On October 20, 2004, the Circuit Court of Cole County remanded the case to the Commission to make additional findings of fact and conclusions of law.

This case is closely related to Case Number TR-2002-251. In that case, the Commission approved tariffs filed by Sprint that implemented a rebalancing of basic local service rates and access service rates, as required by Section 392.245, RSMo 2000. At that time, the Commission found that Sprint should be allowed to reduce its access service charges while increasing its basic local service rates so that both rates would more closely reflect the actual cost of providing those services. Specifically, Sprint would be allowed to implement a rate increase of \$1.50 per basic local access line for each of the next three years, while implementing a corresponding reduction in its access service charges. Public Counsel appealed that order to the Circuit Court of Cole County.

The first annual basic local access line increase was approved in TR-2002-251 on December 6, 2001. Tariffs implementing subsequent annual increases were approved in Case Numbers IT-2003-0166, IT-2003-0167, IT-2003-0168, IT-2003-0169, and IT-2003-0170, on December 10, 2002, and in Case Number IT-2004-0134 on October 2, 2003. Public Counsel opposed each subsequent annual increase but, in its orders approving the increases, the Commission explicitly relied on the initial decision in TR-2002-251 to justify its decision to approve the tariffs submitted by Sprint. Public Counsel appealed each subsequent order to the Circuit Court.

* This case was appealed to Cole County Circuit Court (05ACCC00302). This case was appealed to the Missouri Court of Appeals Western District (WD 66478 consolidated with WD 66479 and WD 66480). In addition, please see in this volume page 191 for Case No. TR-2002-251 and page 341 for Case No. IT-2003-0166. Also see p. 21, Volume 12, MPSC 3d for another order in Case No. IT-2003-0166.

Because it was the first filed, the appeal of TR-2002-251 proceeded before the other two appeals. *In State ex rel. Coffman v. PSC*, 121 S.W. 3d 534 (Mo. App. W.D. 2003), the Court of Appeals remanded that case to the Commission for additional findings of fact and conclusions of law. Since the Commission's order in this case was explicitly grounded on the Commission's order in TR-2002-251, when that order was remanded by the Court of Appeals, the Circuit Court remanded the Commission's order in this case for findings of fact and conclusions of law consistent with the requirements of findings of fact and conclusions of law to be made in the remand of TR-2002-251.

On December 23, 2004, the Commission issued an Order on Remand in TR-2002-251. In that order, the Commission made additional findings of fact and conclusions of law in compliance with the remand order of the Court of Appeals. The Commission again concluded that Sprint had provided sufficient evidence to justify its proposed revenue rebalancing. The Commission denied Public Counsel's request for rehearing of that order on February 1, 2005.

The Commission's order approving the tariffs at issue in this case is wholly dependent upon the order that the Commission issued in TR-2002-251. In fact, this case is really little more than a continuation of that case. As a result, the order in this case must stand or fall along with the order in that case. Therefore, the Commission will adopt the findings of fact and conclusions of law announced by the Commission in its Order on Remand in TR-2002-251, with minor modifications to the conclusion of law, as its findings of fact and conclusion of law for this case.

The findings of fact and conclusions of law adopted are as follows:

FINDINGS OF FACT

At the time of the relevant filings, the average statewide price for Sprint's basic local residential service was \$9.84 and the average statewide rate for basic local business service was \$17.20. (Appendix C, Staff's Verified Recommendation). The statewide two-way access rate was \$0.195. (Appendix C, Staff's Verified Recommendation).

Sprint submitted a verified cost study that was analyzed by members of the Staff of including a Regulatory Economist with responsibility for reviewing telecommunications cost studies.

Sprint's verified cost studies were performed pursuant to a Total Service Long Run Incremental Cost method (TSLRIC). (Appendix B, Staff's Verified Recommendation and Verified Cost Studies). TSLRIC captures forward-looking, long run incremental cost created by total demand for a given service. (Appendix B, Staff's Verified Recommendation and Verified Cost Studies). Sprint's TSLRIC methods utilized least cost, most economical efficient technology and forward-looking engineering practices. (Appendix B, Staff's Verified Recommendation and Verified Cost Studies).

1. Cost of Providing Basic Local Telecommunications Service

Sprint's TSLRIC cost study for local service contains four major components: Loop, Network Interface Device (NID), Port, and Usage Cost. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study). The TSLRIC loop costs capture the costs of the customer line from the Central Office to the NID. (page 3 of 8, Cost of Local Service, Loop Cost Study methods, Sprint's Verified Cost Study). Sprint assigned 75% of the loop cost to intrastate jurisdiction. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study). The NID cost represents the cost for the interconnection to the customer premise wiring. (page 3 of 6, Cost of Local Service, NID Methodology, Sprint's Verified Cost Study). The port costs reflect the non-sensitive traffic cost for local switching associated with basic local exchange service. (page 3 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). In developing the switching TSLRIC cost for local service, Sprint utilized the Switch Cost Information System/Model Office (SCIS/MO), developed by Telecordia that is widely used to capture switch investment in the telecommunications industry. (page 4 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). The usage cost category represents the investment associated with usage sensitive line-side switching. (page 12 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). Finally, Sprint developed a Common cost factor that was applied to the cost components before identifying a TSLRIC cost. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study).

Further, while Public Counsel has raised an issue of whether the studies correctly allocate the loop cost, the Commission finds that the TSLRIC cost produced by Sprint's studies would allow removal of over 50% of the loop cost assigned by Sprint to basic residential local service that appear on Row 20 of the Summary Sheet contained in Sprint's Cost of Local Service. This would still allow three more rate rebalancings of \$1.50 each to be placed on basic local service and still maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local residential service. (page 1 of 8, Summary Sheet, Cost of Local Service, Residential Cost Summary, Sprint's Verified Cost Studies).

Additionally, the Commission finds that the TSLRIC cost produced by Sprint's studies would allow removal of over 33% of the loop cost assigned by Sprint to basic business intrastate jurisdictional local service that appear on Row 20 of Sprint Summary Sheet for business cost, which would still allow

three more rate rebalancings of \$1.50 each to be placed on basic local service and maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local business service. (page 3 of 8, Summary Sheet, Cost of Local Service, Business Cost Summary, Sprint's Verified Cost Studies).

The Commission finds that the costs that are produced by Sprint's cost study (classified as Highly Confidential pursuant to a protective order issued in this case) clearly demonstrate that Sprint's cost of basic local service is more than sufficiently above the price of basic local service to allow for three more rate rebalances of \$1.50 each to be placed on basic local service and maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local service.

2. Cost of Providing Intrastate Switched Access Service

With respect to Sprint's intrastate switched access long run incremental cost, Sprint also performed and verified a TSLRIC cost study. Sprint's cost studies capture forward-looking least cost digital switch technology. (page 6 of 16, Host Cost Switching Inputs, Sprint's Verified Cost Studies). There are three components of the switching study: tandem switching, call termination, and common transport. (page 1 of 1, Cost Summary, Cost of Access, Sprint Verified Cost Study). There is also a common factor applied to each component of the switching cost. (page 1 of 1, Cost Summary, Cost of Access, Sprint Verified Cost Study).

The costs that are produced by Sprint's intrastate access cost study (also classified as Highly Confidential) clearly demonstrate that Sprint's cost of intrastate access is more than sufficiently below the price of intrastate access service to allow for three more rate rebalancings of \$1.50 each to be placed on basic local service and still maintain a price for access that is equal to or more than the long run incremental cost of Sprint's intrastate service.

The revenue analysis that was submitted by Sprint and appears in Staff's Verified Analysis and Recommendation demonstrates that the proposed balance is revenue neutral because Sprint proposes to reduce its access charges in such a way as to decrease its annual revenue by \$2,968,000 and Sprint proposes to make up this revenue loss by raising its basic local service rates by \$1.50 per month per access line, with an estimated revenue impact of \$2,967,000 annually. (Staff's Verified Recommendation and Analysis).

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Further, while Public Counsel has raised an issue of whether the studies correctly allocate the loop cost, we find that the TSLRIC cost produced by Sprint's studies would allow us to allocate almost 100% of the intrastate loop cost to intrastate access that appear on Row 20 of the Summary Sheet contained in Sprint's Cost of Local Service and still allow three more rate rebalancings of \$1.50 each to be placed on basic local service, with a resulting decrease in the access price, and maintain a price for access that is equal to or above the long run incremental cost of Sprint's access service. To arrive at this conclusion based on the record in front of the Commission, the total minutes of access (Attachment: Rates #4, page 1 of 3 in Appendix C of Staff's verified filing) were divided by the number of lines (pages 1 and 2 of summary sheet, Cost of Local Service in Sprint's and Staffs verified filings) to get the total number of minutes per line. Then 100% of the cost of the loop was divided by the total number of minutes per line.

The Commission finds that Sprint's cost studies clearly show that the proposed rebalancing is in conformance with the law, even if substantial costs were allocated away from the local loop.

IV. CONCLUSIONS OF LAW

Sprint is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245, RSMO.

Section 386.020(4) defines basic local telecommunications service as follows:

(4) "Basic local telecommunications service," two-way switched voice service within a local calling scope as determined by the commission comprised of any of the following services and their recurring and nonrecurring charges:

(a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;

(b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;

(c) Access to local emergency services including, but not limited to, 911 service established by local authorities;

- (d) Access to basic local operator services;
- (e) Access to basic local directory assistance;
- (f) Standard intercept service;
- (g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;
- (h) One standard white pages directory listing.

Section 386.020(17) defines exchange access service as follows:

(17) "Exchange access service," a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications services.

Section 392.245 governs the Commission's determination in this case, and states in pertinent part:

No later than one year after the date the incumbent local exchange telecommunications company becomes subject to regulation under this section, the commission shall complete investigation of the cost justification for the reduction of intrastate access rates and the increase of maximum allowable prices for basic local telecommunication service. If the commission determines that the company's monthly maximum allowable average statewide prices for basic local telecommunications service after adjustment pursuant to this subsection will be equal to or less than the long run incremental cost, as defined in section 386.020 RSMo, of providing basic local telecommunications service and that the company's intrastate access rates after adjustment pursuant to this subsection will exceed the long run incremental cost, as defined in section 386.020 RSMo, of providing intrastate access services, the commission shall allow the company to offset the revenue loss resulting from the remaining three-quarters of the total needed to bring that company's intrastate access rates to one hundred fifty percent of the interstate level by increasing the company's monthly maximum allowable prices applicable to basic local telecommunications service by an amount not to exceed one dollar fifty cents on each of the next three anniversary dates thereafter; otherwise, the commission shall order the reduction of intrastate access rates and the increase of monthly maximum allowable prices for basic local telecommunications services to be terminated at the levels the commission determines to be cost-justified.

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Section 386.020(32) defines long run incremental cost as:

(32) "Long run incremental cost," the change in total costs of the company of producing an increment of output in the long run when the company uses least cost technology, and excluding any costs that, in the long run, are not brought into existence as a direct result of the increment of output. The relevant increment of output shall be the level of output necessary to satisfy total current demand levels for the service in question, or, for the new services, demand levels that can be demonstrably anticipated.

Section 386.020(32) specifically excludes from the Commission's consideration any cost not brought into existence as a direct result of the increment of output subject to the cost studies. Therefore, in considering the long run incremental cost of basic local service that requires switched voice services within a local calling scope, we find that it does not violate the statutory definition of long run incremental cost to include a substantial portion . . . of the jurisdictionalized loop cost as cost of basic local service. Further, in considering the long run incremental cost of access service that allows a telecommunications company to enter and exit the local exchange telecommunications network, we find that it does not violate the statutory definition of long run incremental cost to exclude a substantial portion . . . of the jurisdictionalized loop cost as cost of access service. If Sprint did not offer access service, the cost of the loop would not go away; but if there were no loop, there would be no access service].¹ Finally, given the large margins of error with respect to allocating loop costs discussed above, we find that the Commission does not have to make a definitive finding in this case on what exact percentage of the loop, if any, needs to be allocated away from basic local telecommunications service to intrastate switched access services. Based on the above, we find that Sprint's cost studies are consistent with the statutory directive to identify cost based on long run incremental cost as defined in Section 386.020(32).

Finally, the issue of loop allocation as it relates to the Public Counsel 254(k)² argument has been dealt with by the FCC. In its CALLs Order³, the FCC reduced, and in most instances, eliminated implicit subsidies for the local loop among end-users by permitting loop costs to be recovered through a flat rate charge assessed on the basic local service customer rather than through the traffic sensitive per minute charge assessed on the long distance customer. Further, opponents of this cost recovery structure argued that the CALLs proposal violated Section 254(k) for similar reasons as Public Counsel has cited here and the FCC rejected those arguments. The FCC stated:

We find that section 254(k) is not implicated by our action today. Section 254(k) is directed at the allocation of costs between competitive and non-competitive services, both regulated and

¹ The bracketed phrase did not appear in Case No. TR-2002-251.

² 47 U.S.C. Section 254(k).

³ Sixth Report And Order In Cc Docket Nos. 96-262 And 94-1; Report And Order In Cc Docket No. 99-249; Eleventh Report And Order In Cc Docket No. 96-45; issued May 31, 2000; at Paragraph 91.

non-regulated, and prohibits subsidization of competitive services by non-competitive services. The SLC is a method of recovering loop costs; not an allocation of those costs between supported and unsupported services.

Neither basic local service nor switched access service were competitive services for Sprint at the time of the Commission order. Further, the cost studies were consistent with the statutory requirement.

The mathematical questions before the Commission are apparent:

- (a) Are Sprint's costs to provide basic local residence service higher than \$11.24 for this year (and higher than \$14.24 for future years)?
- (b) Are Sprint's costs to provide basic local business service higher than \$18.54 for this year (and higher than \$21.54 for future years)? and
- (c) Are Sprint's costs to provide access services lower than \$0.185 for this year (and lower than \$0.165 for future years)?

Based on the record in front of the Commission, the answer to each one of these questions is yes.

Therefore, from a mathematical perspective, Sprint clearly meets the statutory requirements in that its cost to provide basic local service is higher than the price and the opposite is true for switched access services. That leaves only one question remaining before the Commission: have Sprint's cost studies that provided the input for the mathematical equation produced accurate and reasonable results? Once again, the answer is yes.

First, as an independent and knowledgeable party, Staff spent a substantial amount of time and effort in the evaluation of Sprint's cost models. This information formed a part of Staff's recommendation to approve Sprint's requested tariff changes. Second, Sprint's costs for basic local service are so far above Sprint's rates that even if an error was made, that error would have to produce results nearly 50% below what was produced by Sprint's cost study to make a difference in the Commission's calculation. With reference to Sprint's access study, the error would have to be even greater than 50% to have any effect on the Commission's mathematical determination.

Thus, the margin of error is substantial. Furthermore, there are no indications of any errors, much less substantial errors in Sprint's cost studies. Sprint's cost studies are correct and fully comply with the statutory requirement to reflect long run incremental cost.

Based on those findings of fact and conclusions of law, the Commission finds that its October 2, 2003 Order Approving Tariffs was correct and should be affirmed.

IT IS THEREFORE ORDERED:

- 1. That the Commission affirms its Order Approving Tariffs issued on October 2, 2003.
- 2. That this order shall become effective on March 13, 2005.

Davis, Ch., Murray, Clayton and Appling, CC., concur
Gaw, C., dissents

Woodruff, Senior Regulatory Law Judge

**In the Matter of the Tariff Filings of Sprint Missouri, Inc. d/b/a
Sprint to Modify Rates in Accordance with Sprint's Price Cap
Regulation Pursuant to Section 392.245, RSMo 2000.***

*Case No. IT-2003-0166, consolidated with IT-2003-0167,
IT-2003-0168, IT-2003-0169 & IT-2003-0170
Decided March 3, 2005*

Evidence, Practice & Procedure §27. In its December 10, 2002 Order, the Commission approved tariffs implementing subsequent annual increases by relying on the finding of fact and conclusions of law of a related case, TR-2002-251. Case Number TR-2002-251 was remanded for additional finding of fact and conclusions of law, therefore, the December 10, 2002 order for IT-2003-0166 was also remanded to the Commission. In its March 3, 2005 Order on Remand, the Commission adopted the findings of fact and conclusions of law issued in the Order on Remand in TR-2002-251.

Rates §110. Based on the cost studies submitted by Sprint Missouri, Inc. d/b/a Sprint, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.

Telecommunications §14. Based on the cost studies submitted by Sprint Missouri, Inc. d/b/a Sprint, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.

Telecommunications §47. Based on the cost studies submitted by Sprint Missouri, Inc. d/b/a Sprint, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.

ORDER ON REMAND

On December 10, 2002, the Commission issued orders that approved tariffs submitted by Sprint Missouri, Inc. d/b/a Sprint to revise the company's General Exchange Service (IT-2003-0166), Message Telecommunications Service (IT-2003-0167), Private Line Service (IT-2003-0168), WATS (IT-2003-0169), and Access Service (IT-2003-0170) tariffs.¹ The Office of the Public Counsel objected, but the tariffs were approved over those objections. Public Counsel appealed the Commission's decision to the Circuit Court of Cole County. On October 20, 2004, the Circuit Court of Cole County remanded the case to the Commission to make additional findings of fact and conclusions of law.

* See page 191 for Case No. TR-2002-251 and page 333 for Case No. IT-2004-0134, et al. This case was appealed to Cole County Circuit Court (05ACCC00301).

¹ These five cases were consolidated by order issued February 24, 2005. Case No. TO-2003-0166 has been designated as the lead case.

This case is closely related to Case Number TR-2002-251. In that case, the Commission approved tariffs filed by Sprint that implemented a rebalancing of basic local service rates and access service rates, as required by Section 392.245, RSMo 2000. At that time the Commission found that Sprint should be allowed to reduce its access service charges while increasing its basic local service rates so that both rates would more closely reflect the actual cost of providing those services. Specifically, Sprint would be allowed to implement a rate increase of \$1.50 per basic local access line for each of the next three years, while implementing a corresponding reduction in its access service charges. Public Counsel appealed that order to the Circuit Court of Cole County.

The first annual basic local access line increase was approved in TR-2002-251 on December 6, 2001. Tariffs implementing subsequent annual increases were approved in Case Numbers IT-2003-0166, IT-2003-0167, IT-2003-0168, IT-2003-0169, and IT-2003-0170, on December 10, 2002, and in Case Number IT-2004-0134 on October 2, 2003. Public Counsel opposed each subsequent annual increase but, in its orders approving the increases, the Commission explicitly relied on the initial decision in TR-2002-251 to justify its decision to approve the tariffs submitted by Sprint. Public Counsel appealed each subsequent order to the Circuit Court.

Because it was the first filed, the appeal of TR-2002-251 proceeded before the other two appeals. In the case of *In State ex rel. Coffman v. PSC*, 121 S.W.3d 534 (Mo. App. W.D. 2003), the Court of Appeals remanded that case to the Commission for additional findings of fact and conclusions of law. Since the Commission's order in this case was explicitly grounded on the Commission's order in TR-2002-251, when that order was remanded by the Court of Appeals, the Circuit Court remanded the Commission's order in this case for findings of fact and conclusions of law consistent with the requirements of findings of fact and conclusions of law to be made in the remand of TR-2002-251.

On December 23, 2004, the Commission issued an Order on Remand in TR-2002-251. In that order the Commission made additional findings of fact and conclusions of law in compliance with the remand order of the Court of Appeals. The Commission again concluded that Sprint had provided sufficient evidence to justify its proposed revenue rebalancing. The Commission denied Public Counsel's request for rehearing of that order on February 1, 2005.

The Commission's orders approving the tariffs at issue in this case are wholly dependent upon the order that the Commission issued in TR-2002-251. In fact, this case is really little more than a continuation of that case. As a result, the order in this case must stand or fall along with the order in that case. Therefore, the Commission will adopt the findings of fact and conclusions of law announced by the Commission in its Order on Remand in TR-2002-251, with minor modifications to the conclusions of law, as its findings of fact and conclusion of law for this case.

The findings of fact and conclusions of law adopted are as follows:

FINDINGS OF FACT

At the time of the relevant filings, the average statewide price for Sprint's basic local residential service was \$9.84 and

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the average statewide rate for basic local business service was \$17.20. (Appendix C, Staff's Verified Recommendation). The statewide two way access rate was \$0.195. (Appendix C, Staff's Verified Recommendation).

Sprint submitted a verified cost study that was analyzed by members of the Staff of including a Regulatory Economist with responsibility for reviewing telecommunications cost studies.

Sprint's verified cost studies were performed pursuant to a Total Service Long Run Incremental Cost method (TSLRIC). (Appendix B, Staff's Verified Recommendation and Verified Cost Studies). TSLRIC captures forward-looking, long run incremental cost created by total demand for a given service. (Appendix B, Staff's Verified Recommendation and Verified Cost Studies). Sprint's TSLRIC methods utilized least cost, most economical efficient technology and forward-looking engineering practices. (Appendix B, Staff's Verified Recommendation and Verified Cost Studies).

1. Cost of Providing Basic Local Telecommunications Service

Sprint's TSLRIC cost study for local service contains four major components: Loop, Network Interface Device (NID), Port, and Usage Cost. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study). The TSLRIC loop costs capture the costs of the customer line from the Central Office to the NID. (page 3 of 8, Cost of Local Service, Loop Cost Study methods, Sprint's Verified Cost Study). Sprint assigned 75% of the loop cost to intrastate jurisdiction. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study). The NID cost represents the cost for the interconnection to the customer premise wiring. (page 3 of 6, Cost of Local Service, NID Methodology, Sprint's Verified Cost Study). The port costs reflect the non-sensitive traffic cost for local switching associated with basic local exchange service. (page 3 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). In developing the switching TSLRIC cost for local service, Sprint utilized the Switch Cost Information System/Model Office (SCIS/MO), developed by Telecordia that is widely used to capture switch investment in the telecommunications industry. (page 4 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). The usage cost category represents the investment associated with usage sensitive line-side switching. (page 12 of 16, Switch Cost Study Methods, Sprint's Verified Cost Study). Finally, Sprint developed a Common cost factor that was applied to the cost components before identifying a TSLRIC cost. (page 1 of 8, Cost of Local Service, Sprint's Verified Cost Study).

Further, while Public Counsel has raised an issue of whether the studies correctly allocate the loop cost, the Commission finds that the TSLRIC cost produced by Sprint's studies would allow removal of over 50% of the loop cost assigned by Sprint to basic residential local service that appear on Row 20 of the Summary Sheet contained in Sprint's Cost of Local Service. This would still allow three more rate rebalancings of \$1.50 each to be placed on basic local service and still maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local residential service. (page 1 of 8, Summary Sheet, Cost of Local Service, Residential Cost Summary, Sprint's Verified Cost Studies).

Additionally, the Commission finds that the TSLRIC cost produced by Sprint's studies would allow removal of over 33% of the loop cost assigned by Sprint to basic business intrastate jurisdictional local service that appear on Row 20 of Sprint Summary Sheet for business cost, which would still allow three more rate rebalancings of \$1.50 each to be placed on basic local service and maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local business service. (page 3 of 8, Summary Sheet, Cost of Local Service, Business Cost Summary, Sprint's Verified Cost Studies).

The Commission finds that the costs that are produced by Sprint's cost study (classified as Highly Confidential pursuant to a protective order issued in this case) clearly demonstrate that Sprint's cost of basic local service is more than sufficiently above the price of basic local service to allow for three more rate rebalances of \$1.50 each to be placed on basic local service and maintain a price that is equal to or less than the long run incremental cost of Sprint's basic local service.

2. Cost of Providing Intrastate Switched Access Service

With respect to Sprint's intrastate switched access long run incremental cost, Sprint also performed and verified a TSLRIC cost study. Sprint's cost studies capture forward-looking least cost digital switch technology. (page 6 of 16, Host Cost Switching Inputs, Sprint's Verified Cost Studies). There are three components of the switching study: tandem switching, call termination, and common transport. (page 1 of 1, Cost Summary, Cost of Access, Sprint Verified Cost Study). There is also a common factor applied to each component of the switching cost. (page 1 of 1, Cost Summary, Cost of Access, Sprint Verified Cost Study).

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The costs that are produced by Sprint's intrastate access cost study (also classified as Highly Confidential) clearly demonstrate that Sprint's cost of intrastate access is more than sufficiently below the price of intrastate access service to allow for three more rate rebalancings of \$1.50 each to be placed on basic local service and still maintain a price for access that is equal to or more than the long run incremental cost of Sprint's intrastate service.

The revenue analysis that was submitted by Sprint and appears in Staff's Verified Analysis and Recommendation demonstrates that the proposed balance is revenue neutral because Sprint proposes to reduce its access charges in such a way as to decrease its annual revenue by \$2,968,000 and Sprint proposes to make up this revenue loss by raising its basic local service rates by \$1.50 per month per access line, with an estimated revenue impact of \$2,967,000 annually. (Staff's Verified Recommendation and Analysis).

Further, while Public Counsel has raised an issue of whether the studies correctly allocate the loop cost, we find that the TSLRIC cost produced by Sprint's studies would allow us to allocate almost 100% of the intrastate loop cost to intrastate access that appear on Row 20 of the Summary Sheet contained in Sprint's Cost of Local Service and still allow three more rate rebalancings of \$1.50 each to be placed on basic local service, with a resulting decrease in the access price, and maintain a price for access that is equal to or above the long run incremental cost of Sprint's access service. To arrive at this conclusion based on the record in front of the Commission, the total minutes of access (Attachment: Rates #4, page 1 of 3 in Appendix C of Staff's verified filing) were divided by the number of lines (pages 1 and 2 of summary sheet, Cost of Local Service in Sprint's and Staffs verified filings) to get the total number of minutes per line. Then 100% of the cost of the loop was divided by the total number of minutes per line.

The Commission finds that Sprint's cost studies clearly show that the proposed rebalancing is in conformance with the law, even if substantial costs were allocated away from the local loop.

IV. CONCLUSIONS OF LAW

Sprint is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245, RSMo.

Section 386.020(4) defines basic local telecommunications service as follows:

(4) "Basic local telecommunications service," two-way switched voice service within a local calling scope as deter-

mined by the commission comprised of any of the following services and their recurring and nonrecurring charges:

- (a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;
- (b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;
- (c) Access to local emergency services including, but not limited to, 911 service established by local authorities;
- (d) Access to basic local operator services;
- (e) Access to basic local directory assistance;
- (f) Standard intercept service;
- (g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;
- (h) One standard white pages directory listing.

Section 386.020(17) defines exchange access service as follows:

(17) "Exchange access service," a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications services.

Section 392.245 governs the Commission's determination in this case, and states in pertinent part:

No later than one year after the date the incumbent local exchange telecommunications company becomes subject to regulation under this section, the commission shall complete investigation of the cost justification for the reduction of intrastate access rates and the increase of maximum allowable prices for basic local telecommunication service. If the commission determines that the company's monthly maximum allowable average statewide prices for basic local telecommunications service after adjustment pursuant to this subsection will be equal to or less than the long run incremental cost, as defined in section 386.020 RSMo, of providing basic local telecommunications service and that the company's intrastate

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access rates after adjustment pursuant to this subsection will exceed the long run incremental cost, as defined in section 386.020 RSMo, of providing intrastate access services, the commission shall allow the company to offset the revenue loss resulting from the remaining three-quarters of the total needed to bring that company's intrastate access rates to one hundred fifty percent of the interstate level by increasing the company's monthly maximum allowable prices applicable to basic local telecommunications service by an amount not to exceed one dollar fifty cents on each of the next three anniversary dates thereafter; otherwise, the commission shall order the reduction of intrastate access rates and the increase of monthly maximum allowable prices for basic local telecommunications services to be terminated at the levels the commission determines to be cost-justified.

Section 386.020(32) defines long run incremental cost as:

(32) "Long run incremental cost," the change in total costs of the company of producing an increment of output in the long run when the company uses least cost technology, and excluding any costs that, in the long run, are not brought into existence as a direct result of the increment of output. The relevant increment of output shall be the level of output necessary to satisfy total current demand levels for the service in question, or, for the new services, demand levels that can be demonstrably anticipated.

Section 386.020(32) specifically excludes from the Commission's consideration any cost not brought into existence as a direct result of the increment of output subject to the cost studies. Therefore, in considering the long run incremental cost of basic local service that requires switched voice services within a local calling scope, we find that it does not violate the statutory definition of long run incremental cost to include a substantial portion . . . of the jurisdictionalized loop cost as cost of basic local service. Further, in considering the long run incremental cost of access service that allows a telecommunications company to enter and exit the local exchange telecommunications network, we find that it does not violate the statutory definition of long run incremental cost to exclude a substantial portion . . . of the jurisdictionalized loop cost as cost of access service. If Sprint did not offer access service, the cost of the loop would not go away; but if there were

no loop, there would be no access service].² Finally, given the large margins of error with respect to allocating loop costs discussed above, we find that the Commission does not have to make a definitive finding in this case on what exact percentage of the loop, if any, needs to be allocated away from basic local telecommunications service to intrastate switched access services. Based on the above, we find that Sprint's cost studies are consistent with the statutory directive to identify cost based on long run incremental cost as defined in Section 386.020(32).

Finally, the issue of loop allocation as it relates to the Public Counsel 254(k)³ argument has been dealt with by the FCC. In its CALLs Order⁴, the FCC reduced, and in most instances, eliminated implicit subsidies for the local loop among end-users by permitting loop costs to be recovered through a flat rate charge assessed on the basic local service customer rather than through the traffic sensitive per minute charge assessed on the long distance customer. Further, opponents of this cost recovery structure argued that the CALLs proposal violated Section 254(k) for similar reasons as Public Counsel has cited here and the FCC rejected those arguments. The FCC stated:

We find that section 254(k) is not implicated by our action today. Section 254(k) is directed at the allocation of costs between competitive and non-competitive services, both regulated and non-regulated, and prohibits subsidization of competitive services by non-competitive services. The SLC is a method of recovering loop costs; not an allocation of those costs between supported and unsupported services. Neither basic local service nor switched access service were competitive services for Sprint at the time of the Commission order. Further, the cost studies were consistent with the statutory requirement.

The mathematical questions before the Commission are apparent:

(a) Are Sprint's costs to provide basic local residence service higher than \$11.24 for this year (and higher than \$14.24 for future years)?

(b) Are Sprint's costs to provide basic local business service higher than \$18.54 for this year (and higher than \$21.54 for future years)? and

² The bracketed phrase did not appear in Case No. TR-2002-251.

³ 47 U.S.C. Section 254(k).

⁴ Sixth Report And Order In Cc Docket Nos. 96-262 And 94-1; Report And Order In Cc Docket No. 99-249; Eleventh Report And Order In Cc Docket No. 96-45; issued May 31, 2000; at Paragraph 91.

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(c) Are Sprint's costs to provide access services lower than \$0.185 for this year (and lower than \$0.165 for future years)?

Based on the record in front of the Commission, the answer to each one of these questions is yes.

Therefore, from a mathematical perspective, Sprint clearly meets the statutory requirements in that its cost to provide basic local service is higher than the price and the opposite is true for switched access services. That leaves only one question remaining before the Commission: have Sprint's cost studies that provided the input for the mathematical equation produced accurate and reasonable results? Once again, the answer is yes.

First, as an independent and knowledgeable party, Staff spent a substantial amount of time and effort in the evaluation of Sprint's cost models. This information formed a part of Staff's recommendation to approve Sprint's requested tariff changes. Second, Sprint's costs for basic local service are so far above Sprint's rates that even if an error was made, that error would have to produce results nearly 50% below what was produced by Sprint's cost study to make a difference in the Commission's calculation. With reference to Sprint's access study, the error would have to be even greater than 50% to have any effect on the Commission's mathematical determination.

Thus, the margin of error is substantial. Furthermore, there are no indications of any errors, much less substantial errors in Sprint's cost studies. Sprint's cost studies are correct and fully comply with the statutory requirement to reflect long run incremental cost.

Based on those findings of fact and conclusions of law, the Commission finds that its December 10, 2002 Orders approving Sprint's tariffs, issued in Case Nos. IT-2003-0166, IT-2003-0167, IT-2003-0168, IT-2003-0169, and IT-2003-0170, were correct and should be affirmed.

IT IS THEREFORE ORDERED:

1. That the Commission affirms its December 10, 2002 Orders approving the tariffs in Case Nos. IT-2003-0166, IT-2003-0167, IT-2003-0168, IT-2003-0169, and IT-2003-0170.
2. That this order shall become effective on March 13, 2005.

Davis, Chm., Murray, Clayton, and Appling, CC., concur.
Gaw, C., dissents.

Ruth, Senior Regulatory Law Judge

In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area.*

Case No. ER-2004-0570

Decided March 10, 2005

Electric §20. In determining Empire's revenue requirement, the Commission used the company's actual capital structure, rather than a hypothetical capital structure, which is appropriate only in certain unusual circumstances.

Electric §29. The Commission used a risk-based, comparative analysis, as required by *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679 and *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, in determining that Empire Cost of Common Equity should be 11.0%.

Electric § 18. The Commission adopted Empire's position with regard to depreciation and the service lives of mass property accounts, which reduced Empire's revenue requirement by \$454,780.

With regard to production property accounts service lives, the Commission rejected the reduced service lives sponsored by Empire in favor of longer lives produced through the use of Iowa Curves as advocated by Staff and Public Counsel.

The Commission adopted Empire's position with regard to Interim Net Salvage of Plant Accounts, resulting in a reduction in annual Revenue Requirement of \$444,959.

Because the estimates with regard to Terminal Net Salvage of Production Plant Accounts is unduly speculative, the Commission did not allow the accrual of any of the amounts associated therewith.

Because the fundamental goal of depreciation accounting is to allocate the full cost of an asset, including net salvage, over its economic or service life so that utility customers will be charged for the cost of the asset in proportion to the benefit they receive, the Commission's policy is to return to traditional accounting methods for net salvage.

APPEARANCES

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and

Charles Brent Stewart and Jeffrey A. Keevil, Attorneys at Law, Stewart & Keevil, Southampton Village at Corporate Lake, 4603 John Garry Drive, Suite 11, Columbia, Missouri 65203, for The Empire District Electric Company.

Brian T. McCartney, Attorney at Law, Brydon, Swearngen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for Aquila, Inc.

Ronald Molteni, Assistant Attorney General, Supreme Court Building, Post Office Box 899, Jefferson City, Missouri 65102, for the Missouri Department of Natural Resources.

* This order contains a correction issued by the Commission in a March 16, 2005 order. This case was appealed to Cole County Circuit Court (05ACCC00281). Also, see Volume 12, MPSC 3d page 538 for another order in this case.

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Stuart Conrad, Attorney at Law, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for Explorer Pipeline Company and Praxair, Inc.

Thomas M. Byrne, Attorney at Law, Ameren Corporation, 1901 Chouteau Avenue, St. Louis, Missouri 63101, for Union Electric Company, doing business as AmerenUE.

John B. Coffman, Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Steven Dottheim, Chief Deputy General Counsel, *Keith R. Krueger*, Deputy General Counsel, *Thomas R. Schwarz, Jr.*, Deputy General Counsel, *Dennis L. Frey*, and *David A. Meyer*, Senior Counsel, *Mary Weston* and *Nathan Williams*, Associates General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief

REPORT AND ORDER

Procedural History

On April 30, 2004, The Empire District Electric Company filed proposed tariff sheets, Tariff File No. YE-2004-1324, designed to implement a general rate increase for retail electric service provided by the Company. The new retail electric service rates contained in those proposed tariff sheets were designed to produce an additional \$38,282,294 in gross annual electric revenues, excluding gross receipts, sales, franchise, and occupational taxes, a 14.82% increase over existing revenues. The proposed tariff sheets were proposed to become effective on May 30, 2004.

The Commission issued its Suspension Order and Notice on May 5, 2004, suspending the proposed tariff sheets for 180 days plus six months from the original proposed effective date, that is, until March 27, 2005. In that order, the Commission also set an evidentiary hearing and a deadline for intervention applications. Intervention was granted to Praxair, Inc., Explorer Pipeline Company, Union Electric Company, doing business as AmerenUE ("UE"), Aquila, Inc., and the Missouri Department of Natural Resources ("DNR").

On June 17, the Commission adopted the procedural schedule jointly proposed by the parties. The procedural schedule included dates for the filing of prepared testimony, revised dates for the evidentiary hearing, and a briefing schedule.

On November 22, pursuant to notice provided by the Company through billing inserts, the Commission convened local public hearings within Empire's service territory, at Reeds Spring and Joplin. The Commission heard the testimony of six witnesses at the local public hearings.

Pursuant to the procedural schedule, the Commission convened an evidentiary hearing on December 6 at its offices in Jefferson City, Missouri. Proceedings continued on December 7 through December 9, and on December 13 through December 16. The Commission heard the testimony of 21 witnesses and

received 77 exhibits during the hearing. The Commissioners requested certain exhibits during the hearing and some of these were filed directly into the Commission's electronic docketing system ("EFIS") outside of the hearing, while others were filed as Late-filed Exhibits pursuant to the Commission's traditional practice.¹ No party objected to any of these exhibits and they are received into the record for all purposes.

Many issues were resolved by the agreement of the parties. On December 16, a Nonunanimous Stipulation and Agreement Regarding Rate Design was filed and served on the parties. No party objected and the stipulation became unanimous by operation of Commission rule on December 23. On December 22, a unanimous Stipulation and Agreement as to Certain Issues was filed. Finally, on February 22, a Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense was filed and served on the parties. No party objected and the stipulation became unanimous by operation of Commission rule on March 1.²

The parties filed proposed findings of fact and conclusions of law, briefs and reply briefs according to the procedural schedule. The last briefs were filed on February 4 and the case was submitted on that date.

Discussion

As required by the procedural schedule, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its position with respect to each issue. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

¹ On December 7, 2004, Staff's Letter with Updated Reconciliation and Updated Accounting Schedules; On December 8, the Joint Recommendation Regarding Structure for an Interim Fuel and Purchased Power Mechanism and the Revised Joint Recommendation Regarding Structure for an Interim Fuel and Purchased Power Mechanism; on December 9, the 2nd Revised Joint Recommendation Regarding Structure for an Interim Fuel and Purchased Power Mechanism, the Corrected Direct, Rebuttal and Surrebuttal Testimony of Brad Beecher, HC and NP; on December 10, Corrected Schedule TA-13; on December 14, the December Report of the U.S. Energy Information Administration and Staff's Response to the 2nd Revised Joint Recommendation; on December 15, Letters and Telephone Contacts from Empire's customers, Empire's Objections to the Joint Recommendations, and Staff's Letter with Comparison of Returns on Equity for Empire District Electric Company; on December 16, a page from the Gas Daily showing NYMEX forecasted gas prices; on December 30, a Letter and Staff's Response to the Commission's Fuel Price Scenarios; on January 5, 2005, two pages of responses to questions asked from the bench of Staff witness Guy Gilbert and a spreadsheet of terminal dismantlement costs, also in response to bench questions; on January 7, Empire's Response to the Commission's Order Directing Filing of December 20 (Fuel Price Scenarios); on January 12, Late-filed Exhibit 141, pages 1 and 2 (gas price forecasts); on January 19, Staff's 2nd Updated Reconciliation; on February 14, Late-filed Exhibit 142, pages 1-5 (gas price forecasts; corrected pages were filed on February 15); on February 28, Late-filed Exhibit 124; and on March 9, Staff's 3rd Updated Reconciliation and 2nd Revised Accounting Schedules.

² The Commission's Staff did file Comments in response to the Nonunanimous Stipulation, but expressly stated that these were not objections.

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The issues formulated by the parties are as follows:³

1. **What capital structure is appropriate for Empire?**
2. **What return on common equity recommendation is appropriate in estimating Empire's cost of common equity?**
3. **What embedded cost of debt is appropriate for Empire?**
6. **Depreciation: How shall the depreciation for plant accounts be calculated?**
 - A. **Should life span be applied to production accounts?**
 - B. **Should the Commission use the whole-life or the remaining life technique?**
 - C. **How should the cost of removal net of salvage component be treated?**

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises."⁴ Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.⁵ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.⁶ Nonetheless, the following formulation is often cited:

³ Only the issues and sub-issues not resolved by the three stipulations are shown. The numbering of the issues is unchanged from the original list. The parties' positions on the issues are discussed, to the extent necessary, elsewhere in this order.

⁴ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

⁵ *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of Mo.*, 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

⁶ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁷

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”⁸ Findings of fact are also inadequate that “provide no insight into how controlling issues were resolved” or that are “completely conclusory.”⁹

With these points in mind, the Commission renders the following Findings of Fact.

The Parties:

1. The Empire District Electric Company is a publicly-traded, Kansas corporation, headquartered in Joplin, Missouri. Empire provides retail electric service in Missouri, Kansas, Arkansas, and Oklahoma; retail water service in Missouri (to 4,500 customers in three Missouri communities); and is also certificated to provide telecommunication services in Missouri.

2. Intervenor Praxair, Inc., produces compressed gases at a plant near Neosho, Missouri, within Empire's service territory. Praxair's plant has a load of roughly 7 megawatts (“MWs”) and operates at a load factor of about 90%. Praxair is served under interruptible rates, which means that service to Praxair can be reduced on short notice, making more power available to Empire to serve other customers. Electricity is Praxair's largest operating cost.

3. Intervenor Explorer Pipeline, Inc., operates a refined petroleum products pipeline stretching from the coast of the Gulf of Mexico to the Chicago area, with various truck terminals along that route. Explorer uses electric compressors to move its products through the pipeline and has three compressor stations within Empire's service territory. Explorer's combined load is somewhat less than 7 MWs and its load factor is about 90%.

4. Intervenor Union Electric Company, doing business as AmerenUE, is a regulated electric and gas utility that operates in Missouri.

5. Intervenor Aquila, Inc., is a regulated electric and gas utility that operates in Missouri and elsewhere.

6. The Missouri Department of Natural Resources (“DNR”) is an executive branch department authorized and established by Chapter 640, RSMo. Sections 640.150 through 640.185 charge the Department with certain responsibilities with respect to energy.

7. The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to “represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]”¹⁰

8. The Staff of the Commission traditionally appears as a party in Commission proceedings and is represented by the Commission's General Counsel, an employee of the

⁷ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

⁸ *St. ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

⁹ *St. ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

¹⁰ Sections 386.700 and 386.710.

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Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]"¹¹

Empire's Proposed General Rate Increase:

9. As filed, Empire's proposed tariffs sought additional Missouri jurisdictional revenue of \$38.3 million annually, a 14.82% increase. However, Empire believes that the facts actually entitle it to an increase of \$52.4 million.

Empire's Operations:

10. Empire provides electric service in an area of about 10,000 square miles in Southwest Missouri and the adjacent areas of Arkansas, Kansas and Oklahoma. At the end of 2003, Empire had 131,400 residential electric customers, 23,154 commercial customers, 362 industrial customers, 1,735 public authority customers, and 4 wholesale customers in 120 communities in 21 counties. Most of these communities are small; the largest is Joplin, with about 45,500 inhabitants.

11. About 80% of Empire's revenues are derived from Missouri. In Missouri, Empire had at the end of 2003 114,893 residential customers, 20,346 commercial customers, 291 industrial customers, 1,404 public authority customers, and 3 wholesale customers. Empire sold 3,800,816,375 kWh of electricity at retail in Missouri during the Test Year, that is, the twelve months ending December 31, 2003. Empire's Missouri retail sales constituted about 88.26% of Empire's total Company retail sales of electricity during the Test Year.

12. Empire's updated Test Year income and expenses were as follows:¹²

Empire District Electric Company - Test Year Income & Expenses		
Description	Missouri Jurisdictional	Total Company
1. Operating Revenues	\$258,171,765	\$303,576,426
2. Operating Expenses (less Depreciation Expense)	\$168,855,124	\$181,809,634
3. Depreciation	\$24,348,329	\$26,472,350
4. Amortization Expense	\$589,192	\$654,086
5. Non-Income Expense	\$10,239,614	\$16,106,872
6. Income Taxes	\$11,328,383	\$16,401,532
7. Net Operating Income	\$42,811,123	\$62,131,951

¹¹ Section 386.071.

¹² Based on Staff's 2nd Revised Accounting Schedules, filed March 9, 2005.

13. Empire's updated Test Year Rate Base was as follows:¹³

Empire District Electric Company - Test Year Rate Base	
Description	Missouri Jurisdictional
1. Plant in Service	\$1,020,651,078
2. LESS: Accumulated Depreciation Reserve	\$343,810,985
3. LESS: Accumulated Amortization Reserve	\$3,545,757
4. SUBTOTAL: Net Plant in Service	\$673,294,336
5. ADD: Cash Working Capital	\$2,492,049
6. ADD: Fuel Stock	\$6,088,656
7. ADD: Materials & Supplies	\$15,059,442
8. ADD: Prepayments	\$1,477,175
9. ADD: Prepaid Pension Asset	\$13,254,447
10. SUBTOTAL: Total Additions to Net Plant in Service	\$38,371,770
11. DEDUCT: Interest Offset	\$2,657,552
12. DEDUCT: Federal Income Tax Offset	\$1,229,685
13. DEDUCT: State Income Tax Offset	\$83,665
14. DEDUCT: Customer Advances for Construction	\$1,864,392
15. DEDUCT: Customer Deposits	\$4,876,415
16. DEDUCT: Injuries & Damages Reserve	\$1,160,738
17. DEDUCT: Deferred Income Taxes	\$89,900,210
18. SUBTOTAL: Total Deductions from Net Plant in Service:	\$101,772,657
19. TOTAL: Rate Base	\$609,893,448

¹³ *Id.*

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14. Empire has added about \$100 million of new assets to its rate base since its last rate case. Over the past several years, Empire has met its increased capacity demands by adding natural gas-based generation: 90 MW in 1995, 150 MW in 1997, 150 MW in 2001, and 100 MW in 2003. Empire has added gas-based generation because the capital cost per kW is lower and Empire lacks capital. This has necessarily increased Empire's dependence on natural gas and its exposure to natural gas price volatility. At present, natural gas is the primary fuel of 704 MW of Empire's total of 1,264 MW, fully 56%. Empire burned 6.5 million MMBtu of natural gas in 2003 and expects to burn almost 10 million MMBtu in a "normalized" year.

Rate of Return:

15. Empire is a publicly-traded utility. Empire's consolidated common equity ratio has ranged from a high of 47.18% to a low of 36.65% from 1999 through 2003. During the past five years, Empire's average return on common equity ("ROE") was only 7.66%. Its average embedded cost of debt was 7.25% and its average cost of preferred equity was 8.93%. Prior to its failed merger attempt with Aquila in 2001, Empire was rated A2 by Moody's and A- by Standard & Poor's, both investment grade ratings. Currently, Standard & Poor's Corporation ("S&P") assigns an issuer credit rating of "BBB" to Empire and rates its commercial paper as "A-2." S&P assigns Empire a business profile of "6," which is slightly below average (with average being a "5"). Empire's corporate credit rating of BBB is considered to be of "investment grade," although it is lower than Empire's previous ratings.

16. The industry national average ROE for electric utilities in 1st Quarter 2004 was 11.0%. Empire's ROE is expected by analysts to be 5.5% for 2004, 550 basis points *below* the industry average. Since 1993, Empire has paid out virtually all of its earnings as dividends in an effort to maintain its investment standing. Empire's dividend payout ratio was a very high 216.95% in 2001, meaning Empire paid out more than twice what it earned in 2001. In the last five years the lowest payout ratio that Empire had was 94.81% in 2000. Empire's return on year-end common equity had been relatively consistent from 1999 through 2003, except for 2001 when the ROE was 3.89%. Otherwise, the ROEs were in the 8% to 9% range. Empire's 2003 ROE of 8.79% was below the average of a group of comparable companies at 13.78% for the year ending December 31, 2003. Empire's 2003 Annual Report, filed with the Commission as required by statute, states that Empire's total operating revenues were \$325,504,896 for the 12 months ended December 31, 2003, versus \$305,902,995 for the 12 months ended December 31, 2002. These 2003 revenues resulted in an overall net income applicable to common stock of \$29,450,307 for an earnings per share of \$1.29 as compared to the 2002 net income applicable to common stock of \$25,524,118 for an earnings per share of \$1.19. These revenues and net incomes were generated from total property, plant and equipment of \$833,872,049 at December 31, 2003 and \$798,948,574 at December 31, 2002.

17. Empire's actual consolidated capital structure as of June 30, 2004, was composed of 44.53% long-term debt, at an embedded cost of 7.22%; 6.32% trust preferred securities, at an embedded cost of 8.92%; and 49.14% common equity.

18. James Vander Weide is employed as a Research Professor of Finance and Economics at Duke University. He received a Bachelor Degree in Economics from Cornell in 1966 and a Ph.D. in Finance from Northwestern University in 1972. He has taught at Duke for over 30 years. Vander Weide has also presented seminars and courses to government agencies and corporations; he has published papers and articles in professional journals and has published a book, *Managing Corporate Liquidity: An Introduction to Working Capital Management*. He has presented expert testimony in more than 350 separate proceedings in numerous *fora*, including federal courts, the FERC and before the United States Congress, as well as the utility regulatory commissions of 40 states. One of his areas of expertise is the estimation of the cost of common equity.

19. Vander Weide used the comparable company approach and estimated Empire's cost of equity in two steps. The comparable company approach estimates the subject

company's cost of common equity by identifying a group of companies of similar risk and then estimating the cost of equity for the companies in the proxy group. In step one, Vander Weide applied several standard cost-of-equity methods to market data for a proxy group of comparable companies, including 27 electric utilities and 12 gas utilities, for a total of 39 companies. Second, he adjusted the average cost of equity for the proxy group for the difference between the average capital structure of the proxy group and Empire's capital structure, which contains significantly more debt financing. In the first step referred to above, Vander Weide determined that the average cost of equity for his proxy companies was equal to 10.7%. Vander Weide reached this conclusion through the application of three standard cost-of-equity estimation techniques: (1) the quarterly Discounted Cash Flow ("DCF") method; (2) the Ex Ante Risk Premium method; and (3) the Ex Post Risk Premium method; 10.7% was the simple average of the results produced by the three methods. In the second step referred to above, Vander Weide added 60 basis points to the result of his comparative analysis to reach his final recommendation of 11.3%. The DCF method assumes that the current market price of a firm's stock is equal to the discounted value of all expected future cash flows. The Ex Ante Risk Premium method assumes that an investor's current expectations regarding the equity risk premium can be estimated from recent data on the DCF expected rate of return on equity compared to the interest rate on long-term bonds. The Ex Post Risk Premium method assumes that an investor's current expectations regarding the equity-debt return differential is equal to the historical record of comparable returns on stock and bond investments. The cost of equity under both risk premium methods is then equal to the interest rate on bond investments plus the risk premium.

20. Vander Weide testified that the cost of equity for a company depends on its financial risk, which is measured by the market values of debt and equity in its capital structure. Since Empire's recommended capital structure in this proceeding contains significantly more debt than the proxy companies' average capital structures, the cost of equity for the proxy companies must be adjusted upward so that investors in Empire will have an opportunity to earn a return on their investment in Empire that is commensurate with returns they could earn on other investments of comparable risk. Thus, Vander Weide determined that Empire requires a cost of equity of 11.3% to compensate investors for the higher financial leverage — debt — in Empire's capital structure. He explained that debt investors have a fixed claim on a firm's assets and income that must be paid prior to any payment to the firm's equity investors. Since the firm's equity investors have only a residual claim on the firm's assets and income, equity investments are necessarily riskier than debt investments. Investors require a higher rate of return on investments with greater risk. For this reason, the cost of equity exceeds the cost of debt.

21. Business risk is defined as the uncertainty inherent in projections of a company's future rate of return on assets. Business risk arises as a result of such factors as demand variability, sales-price variability, input-cost variability, ability to adjust output prices for changes in input costs, ability to develop new products in a timely, cost-effective manner, and the extent to which costs are fixed. Standard & Poor's has developed a ten-point ranking system for assessing business risk in the electric energy business, where "1" indicates the lowest business risk and "10" the highest business risk. Standard & Poor's has assessed Empire's business position to be "5."

22. Financial risk is the additional risk a company faces as a result of using debt financing. Standard & Poor's has developed a process that considers both qualitative and quantitative factors to assess the financial risk of electric energy companies. Among the quantitative factors that Standard & Poor's considers are ratios of: (1) funds from operations ("FFO") to total debt; (2) FFO to interest expense; (3) pre-tax interest coverage; and (4) total debt to total capital. Standard & Poor's has developed a matrix of target financial ratios for each business position and bond rating category. For a company such as Empire, with a business position of 5 and a bond rating of BBB, Standard & Poor's has determined that the

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company should have financial ratios of (1) FFO/total debt: 20.5 to 27.0; (2) FFO/interest coverage: 3.0 to 4.0; (3) pre-tax interest coverage: 2.4 to 3.5; and (4) total debt/total capital: 47.0 to 55.0. Vander Weide testified that Empire's current financial ratios in two categories are below the target ranges required for a BBB rating, one category is at the low end of the range, and only one category is above the midpoint of the target range. Specifically, Empire's FFO/total debt is 19.6, as compared to the target of 20.5 to 27.0; its FFO/interest coverage is 2.67, as compared to the target of 3.0 to 4.0; its pre-tax interest coverage is 2.45, compared to the target of 2.4 to 3.5; and its total debt/total capital is 52.8, compared to the target of 47.0 to 55.0.

23. Donald Murry is Professor Emeritus of Economics at the University of Oklahoma. He has a B.S. degree in Business Administration and M.A. and Ph.D. degrees in Economics, all from the University of Missouri-Columbia. In his academic career of over 30 years, he has taught at the University of Missouri-St. Louis in addition to the University of Oklahoma. He has conducted research and consulted in the area of energy and utility regulatory policy for over 30 years. He directed the Center for Economic and Management Research at the University of Oklahoma until 1978 and served as Chief of the Economic Studies Division at the Federal Power Commission from 1971 to 1972. He has offered expert testimony before many federal courts and regulatory agencies, before the United States Senate, and before the utility regulatory commissions of 23 states. He is an expert in the area of regulatory economics.

24. Murry used two methods to estimate the cost of Empire's common equity. He first estimated Empire's cost of equity using the company-specific DCF method and then compared that result to the results of DCF analyses of a group of comparable companies. As a check, Murry estimated Empire's cost of common equity using the Capital Asset Pricing Model ("CAPM") method. He compared that result to the results of CAPM analyses of the same group of comparable companies. Using the DCF method, Murry's analyses produced results as high as 11.88% and 13.53%. Using the CAPM method, Murry's analyses produced results ranging from 10.97% to 11.92%. Murry then interpreted these results in the context of current economic conditions and Empire's particular financial situation. In light of his conclusion that Empire's financial condition is sufficiently precarious that the accurate measurement of the cost of capital in this case is "critical," Murry selected a value near the bottom of his range of results, 12.0%, as his final recommendation.

25. David Murray has been employed as a Utility Regulatory Auditor III by the Staff of the Public Service Commission since June 2000. In May 1995, he earned a Bachelor of Science degree in Business Administration with an emphasis in Finance, Banking and Real Estate from the University of Missouri-Columbia. He earned a Master's degree in Business Administration from Lincoln University in December 2003. Murray has filed rate of return and capital structure testimony in several cases before the Commission since his employment on the Staff.

26. Murray selected the company-specific DCF method as the primary tool by which to determine the cost of common equity for Empire. However, Murray also used the CAPM method and the Risk Premium method to check the reasonableness of his DCF results. Additionally, Murray selected a group of four comparable companies and applied the DCF method and the CAPM method to them to further test the reasonableness of his company-specific DCF result.

27. In performing his company-specific DCF analysis of Empire, Murray reviewed Empire's actual historical dividends per share, earnings per share and book values per share, as well as projected growth rates for Empire. The projected growth rates were obtained from three outside sources. I/B/E/S Inc.'s Institutional Brokers Estimate System, August 19, 2004, median five-year earnings-per-share growth rate for Empire was 2.50% with a low of 2.00% and a high of 3.00%. Standard & Poor's Corporation's Earnings Guide, August 2004, projected a five-year earnings-per-share growth rate of 3.00% for Empire. The Value Line Investment Survey, Ratings and Reports, for July 2, 2004, projected the compound annual rate of growth

for earnings-per-share during the next three-to-five years at 6.50% for Empire. The average of the three outside sources produced a projected growth rate of 4.00%. The average of the historical and projected growth rates produced an average growth rate of 1.67%. The historical growth rates for Empire were negative as a result of an anomalous year in 2001. Value Line calculates its historical five-year and ten-year compound growth rates by taking an average of three years of data for the beginning and ending values in order to smooth out the results. Even with this smoothing, 2001 was such an abnormal year for Empire that it still caused the historical growth rates to be negative. For this reason, Murray testified that he didn't give as much weight to the historical growth rate as he might normally. He testified that, for this same reason, he did not give as much weight to Value Line's projected growth rate. Value Line's projected compound growth rate was based on a period that included Empire's anomalous performance in 2001, resulting in an upwardly-biased projected growth rate that is not sustainable. Murray believed that some of I/B/E/S's and S&P's analysts had taken the anomalous year into consideration because I/B/E/S's median estimated five-year EPS growth rate was 2.50% and S&P's projected five-year earnings-per-share growth rate was 3.00%. Murray chose a growth rate range of 2.25% to 3.25%.

28. The expected yield term (D_1/P_0) of the annual DCF model is calculated by dividing the amount of common dividends per share expected to be paid over the next twelve months (D_1) by the current market price per share of the firm's common stock (P_0). Even though a strict technical application of the model requires the use of a current spot market price, Murray chose to use a monthly high/low average market price of Empire's common stock for the period of February 1, 2004, through July 30, 2004, in an attempt to minimize the effects of market fluctuations on the dividend yield. Schedule 13 presents the monthly high/low average stock market prices for Empire. Empire's common stock price ranged from a low of \$19.480 per share to a high of \$23.480 per share for the period February 1, 2004, through July 30, 2004. This produced a range for the monthly average high/low market price of \$19.990 to \$22.725 per share and was used by Murray for the price term (P_0) in the DCF model. The Value Line Investment Survey: Ratings & Reports, July 2, 2004, stated that Empire's common dividend declared per share would be \$1.28 for 2004 and 2005; Murray used this value for the amount of common dividends per share (D_1) expected-to-be paid by Empire over the next 12 months. By combining the expected dividend of \$1.28 per share and a market price range of \$19.990 to \$22.725 per share, Murray produced an approximate expected dividend yield of 6.04%. Murray used this figure for the yield factor (D_1/P_0) in the DCF model. Murray's final company-specific DCF cost of common equity estimate for Empire was thus a range of 8.29% to 9.29%:

Yield (D_1/P_0) + Growth Rate (g) = Cost of Equity (k)				
6.04%	+	2.25%	=	8.29%
6.04%	+	3.25%	=	9.29%

29. Murray calculated a DCF cost of common equity for each of the four comparable electric utility companies. The first step was to calculate a growth rate. Using the same approach that he had used in determining Empire's growth rate, Murray found that the proxy companies' average historical growth rates ranged from -3.67% to 3.50% with an overall average of 0.96% for the group. The projected growth rates ranged from 0.50% to 11.00% with an average of 3.90%. Taking into account the projected and historical growth rates, Murray calculated a range of growth of 2.45% to 3.90% that he used in the DCF calculation for the comparable companies. His next step was to calculate an expected dividend yield for each of the four electric utility companies. The projected dividend yields ranged from 3.31% to 5.27% for the four proxy companies with the average at 4.72%; Murray used the average figure of 4.72% in the DCF calculation for the proxy companies. The dividend yield of 6.06% used for Empire was greater than the average dividend yield for the proxies. The estimated growth rates and projected dividend yields were then added together to reach an estimated

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DCF cost of common equity for each of the four proxies. By adding a range of growth of 2.45% to 3.90% to the average dividend yield of 4.72% for the proxies, Murray calculated an estimated average cost of common equity for the proxies ranging from 7.17% to 8.62%.

30. Murray performed a CAPM cost of common equity analysis for Empire as a check on his company-specific DCF result. For the purposes of his analysis, the risk-free rate was represented by the average yield for the month of August 2004 on 30-year U.S. Treasury Bonds of 5.06%. For beta, Murray used 0.65%, as published in the Value Line Investment Survey: Ratings & Reports, July 2, 2004. The final term of the CAPM is the market risk premium. The market risk premium represents the expected return from holding the entire market portfolio, less the expected return from holding a risk-free investment. For purposes of his analysis, Murray looked at two time periods for risk premium estimates. The first risk premium Murray used was based on the long-term period of 1926-2003, which was 6.60%. The second risk premium Murray used was based on the short-term, recent period of 1994-2003, which was 3.05%. These risk premiums were taken from Ibbotson Associates, Inc.'s, Stocks, Bonds, Bills, and Inflation: 2004 Yearbook. Murray's CAPM analysis produced an estimated cost of common equity of 9.35% for Empire when using the long-term risk premium period, and 7.04% using the short-term risk premium period. Murray considered the long-term risk premium period result to corroborate the top end of his company-specific DCF results.

31. Murray also performed a CAPM analysis of his proxy group. The betas for the proxies averaged 0.75%, which was above Empire's beta of 0.65%. Using the long-term time period of 1926-2003, the CAPM analysis produced a result of 10.01%; the short-term time period result was 7.35%.

32. Murray also performed a Risk Premium cost of common equity analysis for Empire. The Risk Premium concept implies that the required return on equity is found by adding an explicit premium for risk to a current interest rate. This analysis showed, on average, that Empire's expected return on common equity, as reported by The Value Line Investment Survey: Ratings & Reports, was 417 basis points higher than the average yield on 30-year U.S. Treasury Bonds for the period of January 1994 to August 2004. An average 30-year U.S. Treasury Bond yield was 5.06% for the month of August 2004. Adding 417 basis points to this 30 year U.S. Treasury Bond yield produced an estimated cost of common equity of 9.23%. Murray considered this result to supports the upper part of his company-specific DCF result.

33. Travis Allen holds a Bachelor of Science Degree in Business Economics and Finance with a specialization in Financial Markets and Institutions from Southern Illinois University-Edwardsville. That degree was granted magna cum laude in December of 2001. Allen also holds a Master of Science degree in Business Economics and Finance with a specialization in Finance from that same school. He earned his Masters degree in May 2003. Allen took numerous undergraduate and graduate level classes that taught him the use of the discounted cash flow method, the capital asset pricing method and the means to determine an appropriate capital structure for a company. He did not, however, specifically study utility finance in college. Allen's first exposure to finance as related to a regulated utility did not come until he was employed by the Public Counsel as a Public Utility Financial Analyst in March 2004, about a year ago.

34. Allen performed a company-specific DCF analysis and a CAPM analysis on both Empire and a comparable group of 13 publicly-traded, electric utility companies to reach his final recommendation that Empire's cost of common equity is between 8.96%-9.41%.

35. The annual form of DCF method can be expressed algebraically by this equation:

$$k = D_1/P_s + g$$

where: k is the cost of equity;
 g is the constant annual growth rate of earnings, dividends and book value per share;

$\frac{D_1}{P_s}$ is the expected next period annual dividend; and
 P_s is the current price of the stock.

36. Assuming that dividends grow at a constant annual rate, g , this equation can be solved for k , the cost of equity. The term D_1/P_s is called the dividend yield component of the annual DCF model, and the term g is called the growth component of the annual DCF model. The annual DCF model is only a correct expression for the present discounted value of future dividends if the dividends are paid annually. Vander Weide used a quarterly DCF model since the companies in his proxy group all pay dividends quarterly. The quarterly DCF model differs from the annual DCF model in that it expresses a company's price as the present discounted value of a quarterly stream of dividend payments. The quarterly DCF equation shows that the cost of equity is: the sum of the future expected dividend yield and the growth rate, where the dividend in the dividend yield is the equivalent future value of the four quarterly dividends at the end of the year, and the growth rate is the expected growth in dividends or earnings per share.

37. The CAPM describes the relationship between a security's investment risk and its market rate of return. This relationship identifies the rate of return that investors expect a security to earn so that its market return is comparable with the market returns earned by other securities that have similar risk. The general form of the CAPM is as follows:

$$k = R_f + \hat{a} (R_m - R_f)$$

where: k = the expected return on equity for a specific security;
 R_f = the risk-free rate;
 $\hat{a}$ = beta; and
 $R_m - R_f$ = the market risk premium.

Depreciation:

38. Empire's existing composite depreciation rate of 2.27% is "significantly below" the industry average of 2.99%. Empire spends \$40 million to \$45 million annually for capital additions, a "maintenance" level of expenditure. Empire's Depreciation Expense revenue has been only \$27.8 million annually. Empire has added about \$100 million of new assets to its ratebase since its last rate case.

39. Empire's depreciation consultant, Roff, performed a Depreciation Study. Roff's study calculated that Empire should receive \$25.6 million in additional Depreciation Expense Revenue Requirement, an increase that would nearly double the current level of Depreciation Expense revenue of \$27.8 million. Empire's position is that the facts presented by Roff fully justify an increase of that magnitude. However, in order to avoid rate shock to its customers, Empire elected to limit its requested increase to \$10.2 million. That figure can be achieved in either of two ways: (1) simply reduce the rates proposed by Roff on a pro rata basis so that they will produce an annual increase of \$10.2 million rather than \$25.6 million; or (2) make only a few of the original changes proposed by Roff so that the yield is \$10.2 million rather than \$25.6 million. These changes are (1) change to traditional accrual of Net Salvage, but limit negative Net Salvage in the four highest accounts to 100%; (2) use of the Whole Life method rather than the Remaining Life method; (3) extend the estimated retirement date of the Asbury Plant to 2020 from 2014; and (4) use the updated balances (as of June 30, 2004) rather than the test year balances (December 31, 2003).

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40. For purposes of determining the appropriate service lives for Production Plant Accounts, Empire's consultant, Roff, performed two separate Life Span analyses. The first was based upon historical accounting activity and the second was based upon a forecast of projected investment activity. The historical analysis performed for Production Plant Accounts consisted of the development of a worksheet of additions, retirements and plant balances for each plant site and primary account. Original additions were identified separately from interim additions, and interim retirements were identified separately from terminal retirements. "Original additions" refer to the initial construction cost of a plant or unit. "Interim additions" refer to replacement of initial equipment or the addition of new equipment. "Interim retirements" refer to retirements of components throughout the life of a plant or unit. "Terminal retirements" refer to the final retirement of a plant or unit. Roff believes that utility production plant facilities are unique in that all assets tend to retire at one point in time, in this case, the estimated retirement date. Empire's engineers provided Roff with an estimated retirement date for each production unit. These estimated retirement dates assumed normal maintenance and routine capital replacements, but did not include major investments that may be required to comply with environmental regulations. For each primary account, a forecast worksheet was prepared showing the existing investment, accumulated depreciation, and a projection of interim retirements, as well as the terminal retirement amount. These amounts were utilized in the development of a depreciation rate that provides for full recovery of these surviving and retiring amounts over the life of the facility.

50. In contrast to Empire's use of an estimated, fixed retirement date for each generating unit, Staff's approach is that there is no fixed retirement date for such plants because experience shows that they actually remain in service indefinitely. The effect of Empire's Life Span approach is a shortening of average service lives for generation plant. Both Staff and Public Counsel performed Average Service Lives analyses of Production Plant accounts similar to that performed in determining Average Service Lives for Mass Property Accounts. This method involves the fitting of Iowa Curves to historical retirement data and the use of the curves for predictive purposes. However, Roff testified that these life analyses and, more importantly, the data on which they are based, are not reliable because the sample size is too small. For example, the number of surviving units contained in the life analysis performed by Public Counsel of the steam production function is no more than five because there are only five generating units contained in the actuarial population.

51. Roff used a Life Span forecast approach in order to avoid the methodological problem posed by the small sample size and because the Life Span method best matches what happens to generation facilities in real life. Generation facilities are actually retired at one point in time. Roff's Life Span approach results in shorter service lives and higher depreciation rates than those developed by Staff and Public Counsel based on an actuarial analysis. For example, Public Counsel's witness, Majoros, recommended an average service life of 93 years for Account 311 – Steam-Structures and Improvements – based solely on history. This results in a final retirement for this asset group at age 172 years. Over 54% of the original asset base would attain an age of 93 years prior to retirement. Under Majoros' analysis, the investments in Account 311 for the Iatan Plant, installed in 1980, would not become fully depreciated until the year 2152. Staff's average service life recommendation for Account 311 is longer than Majoros' recommendation. Roff's Life Span method would result in the Iatan plant being fully depreciated by the year 2020. Taking the production plant accounts as a whole, the composite average service life developed by Staff in this proceeding is over 49 years. This is exceeded by the composite average service life of over 52 years developed by the Public Counsel. By comparison, the Company's composite average service life is just under 36 years.

52. The installation, life span and estimated retirement date used by Roff were each plant were as follows:

Plant Description	Type	Installation	Life Span	Retirement Dates
Riverton Unit 7	Steam	1950	40-60 yrs.	1990-2010
Riverton Unit 8	Steam	1954	50-60 yrs.	2004-2014
Asbury Unit 1	Steam	1970	30-45 yrs.	2000-2015
Asbury Unit 2	Steam	1986	25-35 yrs.	2011-2021
Iatan Unit 1	Steam	1980	35-45 yrs.	2015-2025
Ozark Beach Unit 1	Hydraulic	1931	80-100 yrs.	2011-2031
Ozark Beach Unit 2	Hydraulic	1931	80-100 yrs.	2011-2031
Ozark Beach Unit 3	Hydraulic	1931	80-100 yrs.	2011-2031
Ozark Beach Unit 4	Hydraulic	1931	80-100 yrs.	2011-2031
Riverton Unit 9	Other	1964	25-35/30-40 yrs.	1989-2004
Riverton Unit 10	Other	1988	25-35/30-40 yrs.	2013-2028
Riverton Unit 11	Other	1988	25-35/30-40 yrs.	2013-2028
Energy Center Unit 1	Other	1978	25-35 yrs.	2003-2013
Energy Center Unit 2	Other	1981	25-35 yrs.	2006-2016
Energy Center Jet Engine 1	Other	2003	25-35 yrs.	2028-2038
Energy Center Jet Engine 2	Other	2003	25-35 yrs.	2028-2038
State Line Unit 1	Other	1995	25-35 yrs.	2020-2030
State Line Unit 2-Combined	Other	2001	25-35 yrs.	2026-2036

53. None of these plants had been retired by the time the record in this case was closed, although the high-end estimated retirement date had passed in one case and the low-end estimated retirement date had passed in five cases. Roff testified that he relied entirely on the retirement date estimates provided by Beecher, an employee of Empire. Empire had no plans for the replacement of any of the plants whose retirement date had either passed or was imminent. Such plans would be known to the Commission's Staff if they existed.

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54. Empire's actual average annual Net Salvage expense was \$1.7 million from 1998 2003. Empire projects its costs of removal for the years 2004-2008 to be as follows: for 2004: \$2,124,000; for 2005: \$2,305,000; for 2006: \$3,263,000; for 2007: \$3,596; and for 2008: \$1,342,000.

55. The Missouri Public Service Commission has not generally granted net salvage for final retirement of generation plant (terminal net salvage). Fossil fuel plant sites can be rehabilitated and retained in use. Staff's witness Guy Gilbert testified that the expenses associated with the final retirement of such plants are speculative, and thus not known and measurable. There have not been sufficient final retirements of generation plant to make the terminal net salvage of Empire's generation plants known and measurable.

56. Generation plants tend to remain in service indefinitely. It is the policy of the United States Department of Energy that existing generation facility sites remain in place in the future. Such sites have value because they are integral to the transmission and distribution system of the electric grid, they typically are owned by the utility, and they have the facilities necessary for the operation of the plant, such as established coal transportation, cooling sources and gas transportation.

The Settled Issues:

57. On December 16, 2004, the Staff, Empire, the Public Counsel, Praxair, Inc., and Explorer Pipeline Company jointly filed a Nonunanimous Stipulation and Agreement Regarding Rate Design. No party filed a timely objection or request for hearing with respect to this Nonunanimous Stipulation and Agreement. The basic elements of the Rate Design Agreement are: (a) four revenue-neutral changes to the existing rate design; (b) a mechanism to compute the permanent rate components that, when multiplied by current billing units, will equal Empire's revenue requirement authorized by the Commission in this case; and (c) Empire's commitment to evaluate the feasibility and impact of implementing a facilities charge in its next rate case. The four revenue-neutral rate design changes are: (a) a new substation facilities credit in the Large Power Service rate schedule that applies to those customers who take service at the transmission voltage and supply their own substation; (b) modest increases in customer charges for Residential and Small General Service customers; (c) a modest shift in the seasonal rate differential which will allow the recovery of a greater proportion of revenues in the winter billing season than the seasonal rate differential in current rates permits; (d) a modest shift in class revenue responsibility that will reduce Small General Service rates relative to the rates to be charged other customer classes. The rates that will result from these revenue-neutral rate design changes are shown on Attachment 1 of the Rate Design Agreement. The Rate Design Agreement also specifies that any revenue increase reflected in permanent rates shall be accomplished by increasing all rate components shown on Attachment 1 by the same percentage.

58. On December 22, 2004, the Staff, Empire, the Public Counsel, Praxair, Inc., Explorer Pipeline Company, and the Missouri Department of Natural Resources jointly filed a Stipulation and Agreement as to Certain Issues. No party filed a timely objection or request for hearing with respect to this Stipulation and Agreement. The issues involved, which totaled \$2.8 million in revenue requirement, were settled as a package for \$1.4 million in revenue requirement. The Stipulation and Agreement specifies that Empire's Revenue Requirement shall be increased by \$1.4 million annually and that its Rate Base shall be increased by \$3,431,284. The Stipulation and Agreement contains a number of particular agreements as to such items as Pension Accounting, Late Payment Fees, Initiative Design, Implementation and Monitoring, certain Quality of Service issues, and the receipt of certain specified, prepared testimony into the record; as well as minimum spending commitments by Empire on programs including Low Income Weatherization, the Change A Light, Change The World Program, an HVAC and Appliance Rebate Program, Commercial Energy Audits, and a Wind Energy Assessment.

59. On February 22, 2005, Empire, the Public Counsel, Praxair, Inc., and Explorer Pipeline Company jointly filed a Nonunanimous Stipulation And Agreement Regarding Fuel and Purchased Power Expense. No party filed a timely objection or request for hearing with respect to this Nonunanimous Stipulation and Agreement. The Stipulation and Agreement provides that a certain specified amount of Revenue Requirement shall be collected in Empire's permanent rates with respect to its Missouri jurisdictional fixed and variable fuel and purchased power costs and that an additional specified amount of Revenue Requirement for such costs shall be collected on an interim basis, subject to true-up and refund, through a surcharge referred to as an Interim Energy Charge ("IEC"). The IEC shall be in effect for three years. The amount of Revenue Requirement to be included in Empire's permanent rates is \$102,994,356; the additional amount to be collected through the IEC is \$8,249,000.¹⁴ The actual cents-per-kilowatt-hour IEC to be collected from each customer class is set out in Appendix B to the Stipulation and Agreement. The amount collected by the IEC is intended to include only the on-system Missouri retail variable costs collected in FERC accounts 501, 547 and 555. Net revenues from capacity release and gas sales shall be a credit against expenses in the true up. The fixed costs in FERC accounts 501, 547 and 555 shall be collected in permanent rates. The Stipulation and Agreement sets out other details and provisions governing the operation of the IEC, the true up, and any refunds.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The record shows that Empire operates generation plants for the purpose of generating electricity for sale at retail. The Commission concludes that Empire is thus an electrical corporation within the intendments of Section 386.020(15) and a public utility pursuant to Section 386.020(42), RSMo Supp. 2004.¹⁵ The Commission thus has jurisdiction over Empire's services, activities, and rates pursuant to Sections 386.020(42), 386.250 and Chapter 393.

Burden of Proof:

Section 393.150.2 provides in part, "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . electrical corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

¹⁴ These are the Missouri jurisdictional amounts. The total company figures are \$125,000,000 and \$10,000,000, respectively.

¹⁵ Unless otherwise specified, all statutory references are to the Revised Statutes of Missouri (RSMo), revision of 2000.

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Ratemaking Standards and Practices:

The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,¹⁶ subject to judicial review of the question of reasonableness.¹⁷ A "just and reasonable" rate is one that is fair to both the utility and its customers;¹⁸ it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."¹⁹ In 1925, the Missouri Supreme Court stated:²⁰

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. * * * These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.²¹ "[T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental."²² However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.²³ "There can

¹⁶ Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

¹⁷ *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

¹⁸ *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

¹⁹ *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (*en banc*).

²⁰ *Id.*

²¹ *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

²² *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 238 Mo. App. 287, ___, 179 S.W.2d 123, 126 (1944).

²³ *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment.”²⁴

The Commission has exclusive jurisdiction to establish public utility rates,²⁵ and the rates it sets have the force and effect of law.²⁶ A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;²⁷ neither can a public utility change its rates without first seeking authority from the Commission.²⁸ A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission’s.²⁹ Thus, “[r]atemaking is a balancing process.”³⁰

Ratemaking involves two successive processes:³¹ first, the determination of the “revenue requirement,” that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.³² The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue requirement is usually established based upon a historical test year which focuses on four factors:³³ (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.³⁴ The calculation of revenue requirement from these four factors is expressed in the following formula:

²⁴ *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981).

²⁵ *May Dep’t Stores*, *supra*, 341 Mo. at ___, 107 S.W.2d at 57.

²⁶ *Utility Consumers Council*, *supra*, 585 S.W.2d at 49.

²⁷ *Id.*

²⁸ *Deaconess Manor Ass’n v. Pub. Serv. Comm’n*, 994 S.W.2d 602, 610 (Mo. App., W.D. 1999).

²⁹ *May Dep’t Stores*, *supra*, 341 Mo. at ___, 107 S.W.2d at 50.

³⁰ *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm’n*, 765 S.W.2d 618, 622 (Mo. App., W.D. 1988).

³¹ It is worth noting here that Missouri recognizes two distinct ratemaking methods: the “file-and-suspend” method and the complaint method. The former is initiated when a utility files a tariff implementing a general rate increase and the second by the filing of a complaint alleging that the subject utility’s rates are not just and reasonable. See *Utility Consumers Council*, *supra*, 585 S.W.2d at 48-49; *St. ex rel. Jackson County v. Pub. Serv. Comm’n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 50 L.Ed.2d 84, 97 S.Ct. 73 (1976).

³² *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm’n*, 850 S.W.2d 903, 916 n. 1 (Mo. App., W.D. 1993).

³³ In the present case, the test year was established as the twelve months ending December 31, 2003, updated for known and measurable changes through June 30, 2004. *In the Matter of the Tariff Filing of the Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service to Customers in its Missouri Service Area*, Case No. ER-2004-0570 (Order Concerning Test Year and True-up, and Adopting Procedural Schedule, issued June 17, 2004) at 7.

³⁴ *Id.*, citing Colton, “Excess Capacity: Who Gets the Charge From the Power Plant?,” 34 Hastings L.J. 1133, 1134 & 1149-50 (1983).

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$$RR = C + (V - D) R$$

where: RR = Revenue Requirement;
 C = Prudent Operating Costs, including Depreciation Expense and Taxes;
 V = Gross Value of Utility Plant in Service;
 D = Accumulated Depreciation; and
 R = Overall Rate of Return or Weighted Cost of Capital.

The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.³⁵ The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. Section 393.140(4) authorizes the Commission to prescribe uniform methods of accounting for utilities and Section 393.140(8) authorizes the Commission to examine a utility's books and records and, after hearing, to determine the accounting treatment of any particular transaction. In this way, the Commission can determine the utility's prudent operating costs. Section 393.230 authorizes the Commission to value the property of electric utilities operating in Missouri, that is, to determine the rate base.³⁶ Section 393.240 authorizes the Commission to set depreciation rates and to adjust a utility's depreciation reserve from time-to-time as may be necessary.

Rate of Return:

The equation set out above shows that the Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a Rate of Return. For any utility, its fair Rate of Return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of Common Equity, the cost used is its estimated cost.

1. Capital Structure and Embedded Cost of Capital:

The composition of the capital structure and the embedded cost of the components other than common equity is not difficult to ascertain. It is simply a "snap shot" as of a given moment in time. The parties did not agree on the date on which to measure Empire's capital structure. Empire suggested that capital structure be measured as of December 31, 2003, the end of the Test Year, while Staff and Public Counsel proposed June 30, 2004, the end of the update period.

³⁵ See *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, *supra*.

³⁶ Section 393.135 expressly prohibits the inclusion in electric rates of costs pertaining to property that is not "used and useful."

Empire is engaged in other activities in addition to its regulated electric business and both Empire and the Public Counsel proposed to use a hypothetical capital structure based solely on Empire's regulated electric activities. Staff proposed the use of Empire's actual consolidated capital structure.

As it has in the past, the Commission will use Empire's actual consolidated capital structure. The Commission generally prefers to use the actual, consolidated capital structure of a utility rather than a hypothetical capital structure.³⁷ It has been said that "the use of a hypothetical . . . capitalization substitutes an estimate of what the capital cost *would be* under nonexisting conditions for what it *actually* is or *will soon be* under prevailing conditions."³⁸ First, the actual capital structure is the one considered by analysts and investors when assigning Empire a credit rating or making an investment decision. Second, the actual capital structure reflects the decisions management has actually made and the effects of those decisions. A hypothetical capital structure is appropriate only in certain unusual circumstances, for example, to protect ratepayers from imprudent management decisions.³⁹ Third, the use of embedded cost of debt figures generally requires the use of the actual capital structure as opposed to a hypothetical one.⁴⁰

The Commission will use Empire's actual consolidated capital structure as of June 30, 2004, the end of the update period ordered in this case. The use of updated figures is generally preferable as they more nearly reflect the Company as it will exist on the day that the new rates will take effect.

2. Cost of Common Equity:

As stated above, the Commission must estimate the cost of common equity capital. This is a difficult task, as academic commentators have recognized.⁴¹ The United States Supreme Court, in two frequently-cited decisions, has established the constitutional parameters that must guide the Commission in its task.⁴² In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.⁴³

³⁷ See *In the Matter of Empire District Electric Company*, Case No. ER-2001-299 (*Report & Order*, issued Sept. 20, 2001) 17; and see *In the Matter of Missouri Gas Energy*, Case No. GR-2004-0209 (*Report & Order*, issued Sept. 21, 2004) 12-13.

³⁸ C.F. Phillips, Jr., *The Regulation of Public Utilities*, 390 (1993), quoting J.C. Bonbright, *Principles of Public Utility Rates*, 243-44.

³⁹ *Id.*, at 14; *In the Matter of St Joseph Light & Power*, 2 Mo.P.S.C.3d 248, 250 (1993).

⁴⁰ L.S. Goodman, 1 *The Process of Ratemaking*, 603 (1998).

⁴¹ Phillips, *The Regulation of Public Utilities*, *supra*, 394; Goodman, 1 *The Process of Ratemaking*, *supra*, 606.

⁴² *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

⁴³ *Bluefield*, *supra*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

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In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.⁴⁴

The Court restated these principles in *Hope Natural Gas Company*, the later of the two cases:

‘[R]egulation does not insure that the business shall produce net revenues.’ But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.⁴⁵

Two principal methods have emerged for determining the cost of Common Equity: these are the “market-determined” approach and the “comparable earnings” approach.⁴⁶ The market-determined approach relies upon stock market transactions and estimates of investor expectations.⁴⁷ Examples of market-determined methods are the Discounted Cash Flow method (“DCF”) and the Capital Asset Pricing method (“CAPM”).⁴⁸ The comparative earnings approach is a comparative method and relies upon the concept of “opportunity cost,” that is, the

⁴⁴ *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

⁴⁵ *Hope Nat. Gas Co.*, *supra*, 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

⁴⁶ Phillips, *supra*, 394.

⁴⁷ *Id.*

⁴⁸ *Id.*

return the investment would have earned in the next best alternative use.⁴⁹ The comparative earnings approach requires a comparative study of earnings on common equity in both regulated and unregulated enterprises of similar risk.⁵⁰ None of the analyses performed in the present case utilized the comparative earnings approach. A method that was used by the expert witnesses that testified in this case, and which does not fall within the boundaries of either of the principal approaches referred to above, is the Risk Premium method. This method is “relatively straightforward” and requires that the analyst “(1) determine the historic spread between the return on debt and the return on common equity, and (2) add this risk premium to the current debt yield to derive an approximation of current equity return requirements.”⁵¹ In the final analysis, it is not the method employed, but the result reached, that is important.⁵² The Constitution “does not bind ratemaking bodies to the service of any single formula or combination of formulas.”⁵³

It is said that this “is an area of ratemaking in which agencies welcome expert testimony and yet must often make difficult choices between conflicting testimony.”⁵⁴ Four expert witnesses offered testimony on this issue: Dr. James Vander Weide and Dr. Donald Murry for Empire, David Murray for the Commission’s Staff, and Travis Allen for the Public Counsel. The latter two witnesses were permitted to testify over Empire’s objection that they did not qualify as experts. That objection was overruled at the hearing and the Commission reaffirms that ruling now.

The Missouri Supreme Court has recently explained that the standard for the admission of expert testimony in administrative proceedings, as in civil cases, is that set forth in Section 490.065, which provides:⁵⁵

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

* * *

⁴⁹ *Id.*, at 397.

⁵⁰ *Id.*, at 397-98.

⁵¹ *Id.*, at 399.

⁵² Within a wide range of discretion the Commission may select the methodology. *Missouri Gas Energy v. Public Service Comm’n*, 978 S.W.2d 434 (Mo. App., W.D. 1998), *rehearing and/or transfer denied*; *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880, 882 (Mo. App., W.D. 1985); *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 888 (Mo. App., W.D. 1981). It may select a combination of methodologies. *State ex rel. City of Lake Lotawana v. Public Service Comm’n of State*, 732 S.W.2d 191, 194 (Mo. App., W.D. 1987).

⁵³ *Fed. Power Comm’n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037, 1049-50 (1942).

⁵⁴ Goodman, 1*The Process of Ratemaking*, *supra*, 606.

⁵⁵ *St. Bd. of Reg. for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo. banc 2003).

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3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

The record shows, and the Commission concludes, that both Murray and Allen possess Bachelor and Master degrees in Business Administration and Finance and have received academic training, as well as professional experience, sufficient to meet the minimum standard set in Section 490.065.1. Any deficiencies in the education, training or experience of either of these witnesses when compared to the professional attainments of Dr. Vander Weide or Dr. Murry go to the weight to be accorded their testimony and not to its admissibility.⁵⁶ “If the witness has some qualifications, the testimony may be permitted.”⁵⁷ The record also shows, and the Commission concludes, that the facts and data upon which their testimony and opinions are based are “of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.”⁵⁸ Indeed, they are the same sort of facts, data and methods relied upon by Drs. Vander Weide and Murry, whose expertise is unchallenged.

The four experts did not agree in their recommendations or in the methods used to reach those recommendations. Murray and Allen, testifying for Staff and the Office of the Public Counsel, respectively, each used a company-specific DCF approach as his primary analytical tool, checked against the results of DCF analyses of a group of comparable companies and further checked against the results of CAPM analyses of both Empire and of the proxy group. Their methods and results were similar, although Murray produced significantly lower results than Allen. Murry, testifying for Empire, also used a company-specific DCF approach as his primary analytical tool, checked against the results of DCF analyses of a proxy group of comparable companies and further checked against the results of CAPM analyses of Empire and of the proxy group. Murry’s analytical strategy was thus broadly similar to those of Murray and Allen, but differed significantly in the details and differed radically in Murry’s interpretation. Vander Weide, in contrast, used a comparative method, the “comparable company” approach. He did not perform any direct analysis of Empire, but rather applied a DCF analysis and two variants of the Risk Premium method to a large proxy group and then applied an “adder” to the result to reflect Empire’s significantly more debt-encumbered and thus risky capital structure.

The Commission is of the opinion that it must draw primary guidance in the evaluation of the expert testimony from the Supreme Court’s *Hope* and *Bluefield* decisions. Pursuant to those decisions, returns for Empire’s shareholders must

⁵⁶ *Hord v. Morgan*, 769 S.W.2d 443, 448 (Mo. App., W.D. 1989): “the extent of an expert’s experience or training in a particular field goes to the weight of the testimony and does not render the testimony incompetent.”

⁵⁷ *Whitnell v. State*, 129 S.W.3d 409, 413 (Mo. App., E.D. 2004).

⁵⁸ Section 480.065.3; see *McDonagh*, *supra*, 123 S.W.3d at 157.

be commensurate with returns in other enterprises with corresponding risks. Just and reasonable rates must include revenue sufficient to cover operating expenses, service debt and pay a dividend commensurate with the risk involved. The language of *Hope* and *Bluefield* unmistakably requires a *comparative method*, based on a quantification of risk.

Of the expert witnesses, only Vander Weide used a comparative analytical strategy in which Empire's cost of common equity was determined by examining a proxy group selected on the basis of comparable risk. The other experts, by contrast, depended primarily upon a company-specific DCF analysis and used a comparative analysis only incidentally, to check the reasonability of the primary results. The company-specific DCF method seeks to measure investor expectations using company-specific data; it is merely the expected yield – obtained by dividing the current dividend by the current price per share – plus the sustainable growth rate. The result is the discounted present value of all expected future cash flows and value increases. However, the method requires the application of expert professional judgment at every step: the selection of the price per share to be used; the selection of the growth rate to be used; and the selection of the form of the model to be used. Confidence in the method's results is necessarily shaken when, as here, three expert analysts, using demonstrably the same analytical strategy founded upon the company-specific DCF method, produce results as widely varying as those sponsored here by Murry, Murray and Allen. Confidence in the method's results is further diminished when it is used in circumstances that violate its basic assumptions.⁵⁹ In any event, it is not investor expectations of Empire that are important under *Hope* and *Bluefield*, except perhaps with respect to the attraction-of-capital parameter discussed below, it is rather the performance of other companies that are comparable to Empire in terms of risk. Only through this sort of comparative analysis can a return commensurate with returns in other enterprises with corresponding risks be determined.

In addition to the comparative analysis discussed above, *Hope* and *Bluefield* also expressly refer to objective measures. The allowed return must be sufficient to ensure confidence in the financial integrity of the company in order to maintain its credit and attract necessary capital. By referring to confidence, the Court again emphasized risk. The evidence is unrefuted that Empire's credit rating has been downgraded. The evidence also shows that Empire's access to capital has been correspondingly impaired – Empire must pay higher rates to borrow money. Its earnings per share have declined and it has not been able to realize the return on equity of 10.0% authorized in its last rate case. These facts are significant objective indicators that Empire's rates have been too low and must be increased.

Of the four analysts, only Vander Weide performed the sort of risk-based, comparative analysis *required* by *Hope* and *Bluefield*. For this reason, the Commission will adopt Vander Weide's recommendation of 11.3% as a starting point for determining Empire's Cost of Common Equity. Vander Weide's recommendation is slightly higher than the industry average of 11.0%, which is reason-

⁵⁹ Murray admitted that Empire violated the fundamental assumptions of the DCF model. Tr. 1281-2.

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able in view of the high level of risk universally assigned to Empire by the analytical services. It is also well within the “zone of reasonableness” defined by this Commission in a previous case (within 100 basis points above or below the industry average).⁶⁰

In its decision in *Missouri Gas Energy*, the Commission stated that it does not believe that its return on equity finding should “unthinkingly mirror the national average.”⁶¹ However, the national average is an indicator of the capital market in which Empire will have to compete for necessary capital. One requirement imposed by *Hope* and *Bluefield* is that Empire’s rates be sufficient to permit it to obtain necessary capital.

Vander Weide added 60 basis points to the average cost of equity produced by his tripartite comparative analysis in order to reflect Empire’s more leveraged capital structure. The level of risk that Empire presents to investors will be reduced by two other aspects of this case. First, the parties have stipulated to an Interim Energy Charge (“IEC”) mechanism, which goes far to reduce the risk over the short term that Empire will not recover its fuel and purchased power expenses. Second, as shall also be discussed later in this order, the Commission has found for Empire on the Net Salvage issue. This decision also significantly reduces a risk element often cited by analysts in connection with Empire. For these reasons, the Commission is of the opinion that Vander Weide’s result does not require an upward adjustment of 60 basis points. Instead, the Commission will reduce the upward adjustment to only 30 basis points, resulting in a Cost of Common Equity of 11.0%.

Having determined Empire’s Cost of Common Equity, the Commission may calculate Empire’s composite weighted cost of capital, that is, its fair rate of return:

Component	Proportion	Cost	Weighted Cost
Long-term debt	44.53%	7.22%	3.215%
Preferred securities	6.32%	8.92%	0.564%
Common equity	49.14%	11.00%	5.405%
	100.00%		9.184%

⁶⁰ *In the Matter of Missouri Gas Energy*, Case No. GR-2004-0209 (*Report & Order*, issued Sept. 21, 2004) 20.

⁶¹ *Id.*

Having calculated Empire's fair rate of return at 9.184%, the following calculations can be made:⁶²

Revenue Requirement	
1. Net Original Cost Rate Base	\$609,893,448
2. Rate of Return	9.184%
3. Net Operating Income Requirement	\$56,012,614
4. Net Operating Income Available	\$42,811,123
5. Additional Net Operating Income Requirement	\$13,201,491

Depreciation:

Depreciation is an accounting convention under which the value of an asset is reduced proportionately over the course of its useful life. At the end of its life, the asset is considered to have lost all value except residual salvage value. If the accounting convention were perfect, an asset would be fully depreciated at the time it is actually retired, that is, removed from service.⁶³ In ratemaking, depreciation is an operating expense, the purpose of which is to return to the investors their original investment in an asset as it is consumed in the public service. "The purpose of the annual allowance for depreciation and the resulting accumulation of a depreciation reserve is . . . to enable the utility to recover the cost of such property to it."⁶⁴ Depreciation expense is booked to the depreciation reserve, which amount is deducted in ratemaking from the original cost basis of the utility's plant-in-service or rate base. The resulting net rate base is the present value of the investors' capital assets devoted to public service.

The Constitution requires that the investors' original capital outlay be returned to them in rates as the utility's assets are expended in the public service:

A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. . . . [The Company] is entitled to see that from earnings the value of the property

⁶² Figures are based on Staff's 2nd Revised Accounting Schedules, filed on March 9, 2005.

⁶³ See *In the Matter of St. Louis County Water Company*, 4 Mo.P.S.C.3d 94, 102-3 (1995); *In the Matter of Depreciation*, 25 Mo.P.S.C. (N.S.) 331.

⁶⁴ *St. ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n*, 537 S.W.2d 388, 396-397 (Mo. banc 1976).

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invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning.⁶⁵

It is well-established that depreciation is to be based on the original cost of the utility assets. “[T]his Court recognized in *Lindheimer v. Illinois Bell Tel. Co.*,⁶⁶ the propriety of basing annual depreciation on cost. By such a procedure the utility is made whole and the integrity of its investment maintained. No more is required.”⁶⁷ Section 393.240 authorizes the Commission to require electric utilities in Missouri to maintain depreciation accounts.

Empire seeks an increase in annual depreciation expense of approximately \$10.2 million, a figure that is less than half of the increase of \$25.6 million that its depreciation consultant recommended. To achieve this increase, Empire seeks to raise its composite depreciation rate to 3.30% annually from its present level of 2.27%. Specifically, Empire proposes the use of updated balances rather than Test Year balances; the use of average service lives for mass property accounts based on mortality data; the use of life span analysis for production plant accounts, but with a modified retirement date for the Asbury Plant; and the “traditional” accrual of net salvage, capped at 100%.

1. Mass Property Accounts Service Lives:

With respect to Mass Property Accounts, the issue is what amount to include in Revenue Requirement for Depreciation Expense related to this category of property. “Mass property” includes transmission, distribution and general plant assets. The parties differ in the length of the service lives they use, with Empire proposing *longer* service lives for mass property, resulting in *lower* rates. In the Average Service Life Method, service lives are determined for each asset category by fitting statistically-derived Iowa Curves to historical data. In this way, the Iowa curve serves as a prediction of future retirement experience. While both Staff and Empire used the same Average Service Life Method, Empire’s consultant made further adjustments based on Company experience and expectations. These adjustments result in longer service lives and, consequently, a lower Revenue Requirement.

This issue does not require lengthy analysis. Public Counsel generally supports Empire’s position as it results in a lower Revenue Requirement and thus lower rates. The Commission will adopt Empire’s position with respect to the service lives of mass property accounts, thereby reducing Empire’s Revenue Requirement by \$454,780.⁶⁸

⁶⁵ *Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 13-14, 29 S.Ct. 148, 152, 53 L. Ed. 371, 381 (1909).

⁶⁶ 292 U.S. 151, 54 S.Ct. 658, 78 L.Ed. 1182 (1934).

⁶⁷ *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 606-607, 64 S.Ct. 281, 289-90, 88 L.Ed. 333, 347 (1944).

⁶⁸ The figures are taken from Staff’s 3rd Updated Reconciliation, filed on March 9, 2005.

2. Production Property Accounts Service Lives:

Staff and Empire agree that, because the service life of each individual piece of production plant cannot be known at the time it is put into service, its service life must be estimated. However, they do not agree on the method by which to make these estimates. In general, Empire proposes the use of shorter service lives in depreciating Production Accounts, resulting in higher depreciation rates and a higher Revenue Requirement. Empire's position, if accepted, would increase the annual depreciation expense and revenue requirement by \$3,089,159 over Staff's proposal and \$3,020,535 over Public Counsel's proposal.⁶⁹

In determining the Service Lives to be used in depreciating production accounts, that is, generating plants, Empire proposes the use of the Life Span method. The Life Span method depends on Company estimates of service lives. Staff and Public Counsel criticize Empire's position on the grounds that the estimated retirement dates of Empire's plants, upon which Roff's analyses were based, are simply not credible. Staff and Public Counsel instead urge the use of the Average Service Life method with Production Plant Accounts just as with Mass Property Accounts; in other words, the fitting of Iowa Curves to historical data. Roff testified that the sample sizes are simply too small to support the use of this statistical method.

The record shows that Empire has retired no plants, although the purported estimated date for doing so has come and gone in at least one case. Further, Empire has no plans to replace any of its plants, a circumstance that suggests that retirement is not imminent. The record shows that generation plants tend to remain in service indefinitely under present conditions and that this is likely to continue to be the case in the future. For these reasons, the Commission will reject the reduced service lives sponsored by Empire in favor of the longer lives produced through the use of Iowa Curves as advocated by Staff and Public Counsel. The Commission concludes that the estimated retirement dates relied upon by Roff are simply not persuasive.

3. Net Salvage:

The most contentious issue in the area of depreciation is that of Net Salvage, or, more properly, Negative Net Salvage. Salvage is the scrap value of a depleted asset that is no longer useful for utility service. Net Salvage is the quantity that remains after the cost of removing the asset is subtracted from its salvage value. Often, Net Salvage is *negative* because the cost of removing the asset exceeds its salvage value. In that case, the difference is properly charged to ratepayers in rates.

Traditional regulatory accounting includes Net Salvage as a component of Depreciation Expense. However, Staff has advocated a different approach over the past several years and that is the approach that was actually adopted in Empire's last rate case.⁷⁰ Staff's favored approach is to remove the Net Salvage component

⁶⁹ *Id.*

⁷⁰ *In the Matter of Empire District Electric Co.*, Case No. ER-2001-299 (*Report & Order*, issued Sept. 20, 2001).

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from Depreciation Expense and to recognize Net Salvage as an operating expense as it occurs. The effect is to reduce the utility's Depreciation Expense and, thus, Revenue Requirement, by a significant amount.

Under the traditional accrual method favored by Empire, the depreciation rate for a particular asset or group of assets is calculated as follows:⁷¹

$$\text{Depreciation Rate} = \frac{100\% - \% \text{ Net Salvage}}{\text{Average Service Life (years)}}$$

In this formula, net salvage equals the gross salvage value of the asset minus the cost of removing the asset from service.⁷² The net salvage percentage is determined by dividing the net salvage experienced for a period of time by the original cost of the property retired during that same period of time.⁷³

The present case involves Net Salvage of both Mass Property and Production Accounts. In the case of the latter, a further distinction is made between Interim Net Salvage and Terminal Net Salvage. Interim Net Salvage refers to the salvage and removal costs associated with interim retirements. Terminal Net Salvage refers to the ultimate dismantlement of plant facilities, which includes both salvage and removal costs. Empire urges the Commission to return to traditional Net Salvage accounting and to include an amount for the accrual of Net Salvage in Depreciation Expense. The effect of Empire's proposal would generally be to increase Revenue Requirement by about \$5,327,460 for Mass Property, (\$555,959) for Production Property Interim Net Salvage and \$870,139 for Production Property Terminal Net Salvage.⁷⁴

First, with respect to Empire's position on Interim Net Salvage of Plant Accounts, the result of adopting Empire's position would be a *reduction* in annual Revenue Requirement of \$555,959. As with the issue of Mass Property Service Lives, the Commission is of the opinion that Empire's position should be adopted.

Second, with respect to Terminal Net Salvage of Production Plant Accounts, this Commission generally has not allowed the accrual of this item. The reason is that generating plants are rarely retired and any allowance for this item would necessarily be purely speculative. It is true that all depreciation is founded upon estimates, but all estimates are not unduly speculative. Just as utility companies plan rate cases around the projected in-service dates of new plants, so Empire can plan around the retirement of its generating plants so that the Net Salvage expense is incurred in a Test Year. Another alternative is the device of the Accounting Authority Order. As already discussed in connection with the Production Account Service Life issue, there is no evidence that the retirement of any of Empire's plants is imminent and the estimated retirement dates considered in this proceeding are not persuasive. For these reasons, the Commission will not allow the accrual of any amount for Terminal Net Salvage of Production Plants.

⁷¹ *In the Matter of Laclede Gas Co.*, Case No. GR-99-315 (3rd Report & Order, issued Jan. 11, 2005).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ The figures are taken from Staff's 3rd Updated Reconciliation, filed on March 9, 2005.

Remaining is the issue of Net Salvage on Mass Property. Staff opposes the accrual of this item, arguing that Net Salvage should not be accrued through depreciation rates in the traditional manner, but instead should be based on an average of the Net Salvage actually experienced over a representative time period. Public Counsel asserts a similar position and argues that the accrual of Net Salvage is nothing more than an enforced and improper capital contribution from ratepayers.

In a recent case, the Commission stated that the fundamental goal of depreciation accounting is to allocate the full cost of an asset, including its Net Salvage cost, over its economic or service life so that utility customers will be charged for the cost of the asset in proportion to the benefit they receive from its consumption.⁷⁵ The Commission found in that case that the traditional accrual method used by the utility was consistent with that fundamental goal.⁷⁶ It is the policy of this Commission to return to traditional accounting methods for Net Salvage.

Staff and the Public Counsel express dismay at the disparity between actual costs incurred by utilities such as Empire to remove depreciated assets and the traditional negative net salvage accruals. Public Counsel compares the \$10.2 million in additional annual Depreciation Expense sought by Empire in this case to Empire's admitted cost-of-removal projections over the five years from 2004 to 2008, inclusive, which do not total \$10 million for the entire period. The Commission addressed this point in the *Laclede* case already cited.⁷⁷

In criticizing the accrual method for determining net salvage, Staff did show that Laclede is recovering more in depreciation for net salvage than it is currently spending. Ratepayers pay \$2.3 million more in depreciation annually under the accrual method than under Staff's proposed expense method.

Laclede explained this result, however, with evidence showing a consistent and significant upward trend over time in both the installation cost of the plant used by Laclede to provide utility service, as well as in the cost to remove such plant from service. In fact, just maintaining the net salvage percentage at its historical rate would result in a higher level of net salvage costs than that currently being realized by the Company, since it applies to an asset base that has grown and continues to grow over time. For example, the evidence shows that in 1950 Laclede's total plant in service was only 6 percent of what it is today.

⁷⁵ *Id.*, at 7.

⁷⁶ *Id.*

⁷⁷ *Id.*, at 8-9.

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As in the *Laclede* case cited above, it is the Commission's conclusion that, with respect to Mass Property, traditional accrual of Net Salvage is required. As proposed by Empire, this accrual will be capped at 100%.

4. Updated Balances:

Empire also proposed the use of updated balances rather than Test Year balances. None of the parties appear to oppose this request and the Commission, consequently, will grant it.

The Settled Issues:

Three separate Stipulations and Agreements were filed. None were joined by all parties. However, because no party filed an objection to any of the Stipulations and Agreements, the Commission may, pursuant to Commission Rule 4 CSR 240-2.115(2), treat each of the Stipulations and Agreements as unanimous. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.⁷⁸ In reviewing the Stipulations and Agreements submitted by the parties, the Commission notes that:⁷⁹

- (a) Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law with respect to the issues resolved by the Stipulations and Agreements. The Commission convened an evidentiary hearing in this case and the parties presented such evidence as they chose; the requirement of a hearing has been met.

The Commission has reviewed the Stipulations and Agreements filed in this case and is of the opinion that they are just and reasonable and should be approved.

IT IS THEREFORE ORDERED:

1. That the proposed electric service tariff sheets submitted under Tariff File No. YE-2004-1324 on April 30, 2004, by Empire District Electric Company for the purpose of increasing rates for retail electric service to customers are hereby rejected. The specific sheets rejected are:

P.S.C. Mo. No. 5, Section A

20th Revised Sheet No. 1, Canceling 19th Revised Sheet No. 1

⁷⁸ Section 536.060, RSMo Supp. 2004.

⁷⁹ Section 536.090, RSMo Supp. 2004. This provision applies to the Public Service Commission. *St. ex rel. Midwest Gas Users' Assoc. v. Pub. Serv. Comm'n*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

P.S.C. Mo. No. 5, Section 1 ____

12th Revised Sheet No. 1, Canceling 11th Revised Sheet No. 1
9th Revised Sheet No. 2, Canceling 8th Revised Sheet No. 2

P.S.C. Mo. No. 5, Section 2

11th Revised Sheet No. 1, Canceling 10th Revised Sheet No. 1
11th Revised Sheet No. 2, Canceling 10th Revised Sheet No. 2
11th Revised Sheet No. 3, Canceling 10th Revised Sheet No. 3
12th Revised Sheet No. 4, Canceling 11th Revised Sheet No. 4
11th Revised Sheet No. 5, Canceling 10th Revised Sheet No. 5
11th Revised Sheet No. 6, Canceling 10th Revised Sheet No. 6
11th Revised Sheet No. 7, Canceling 10th Revised Sheet No. 7
7th Revised Sheet No. 9, Canceling 6th Revised Sheet No. 9
6th Revised Sheet No. 13, Canceling 5th Revised Sheet No. 13

P.S.C. Mo. No. 5, Section 3

12th Revised Sheet No. 1, Canceling 11th Revised Sheet No. 1
16th Revised Sheet No. 2, Canceling 15th Revised Sheet No. 2
11th Revised Sheet No. 3, Canceling 10th Revised Sheet No. 3
11th Revised Sheet No. 4, Canceling 10th Revised Sheet No. 4
3rd Revised Sheet No. 5, Canceling 2nd Revised Sheet No. 5
1st Revised Sheet No. 6, Canceling Original Sheet No. 6
Original Sheet No. 7
Original Sheet No. 8
Original Sheet No. 9

P.S.C. Mo. No. 5, Section 4

2nd Revised Sheet No. 8, Canceling 1st Revised Sheet No. 8
4th Revised Sheet No. 17 (Rider IEC), Canceling 3rd Revised Sheet No. 17
4th Revised Sheet No. 17 (Rider FA), Canceling 3rd Revised Sheet No. 17⁸⁰

P.S.C. Mo. No. 5, Section 5 ____

4th Revised Sheet No. 18, Canceling 3rd Revised Sheet No. 18

2. That Empire District Electric Company may file proposed electric service tariff sheets in compliance with this Report and Order.

3. That the Nonunanimous Stipulation and Agreement Regarding Rate Design, filed on December 16, 2004, and deemed to be unanimous by operation of Commission Rule, is hereby approved. The parties shall comply with the terms of the Stipulation and Agreement.

4. That the Unanimous Stipulation and Agreement as to Certain Issues, filed on December 22, 2004, is hereby approved. The parties shall comply with the terms of the Stipulation and Agreement.

5. That the Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense, filed on February 22, 2005, and deemed to be unanimous by operation of

⁸⁰ Unusually, Section 4 of Empire's P.S.C. Mo. No. 5 includes two sheets numbered 17.

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Commission Rule, is hereby approved. The parties shall comply with the terms of the Stipulation and Agreement.

6. That all pending motions, not otherwise disposed of herein, are hereby denied.
7. That this Report and Order shall become effective on March 27, 2005.
8. That this case may be closed on March 28, 2005.

Davis, Chm., Murray, and Appling, CC.,
concur;
Gaw and Clayton, CC., dissent, with
separate dissenting opinion attached;
certify compliance with the provisions
of Section 536.080, RSMo.

Thompson, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONERS STEVE GAW AND ROBERT CLAYTON III

By this Order the Commission sends its second signal that Missourians should expect higher bills from regulated utilities. At a time when Missourians are struggling to pay \$2.00 per gallon gasoline prices and home heating bills that have increased drastically as a result of more than doubling unregulated wholesale gas prices in recent years, this Commission is adding to that burden by adopting new policies on rate cases that will increase that burden even more.

Instead of questioning whether this rate increase is driven primarily by Empire's management decisions over the last several years that have resulted in too much dependence on natural gas-driven generation and dividend policies that hide management's performance, the decision of the majority sends a reward package to the Company, paid for without consent by the citizens and businesses of southwest Missouri. Ultimately, this decision imposes a rate increase of approximately \$30 million on these citizens and businesses.

This case falls on the heels of the Missouri Gas Energy (MGE) decision which raised rates by almost \$25 million. That decision has been remanded by the Circuit Court because the majority's Report and Order discredited the Staff and the Office of Public Counsel (OPC) witnesses and then incredibly built the order on their testimony. As a result it is possible that the majority has painted itself in a corner on remand requiring a new rate of return based on the Company witnesses in that case – translating into an even higher return and higher rates.

In this case the majority follows the path even further. Here the majority not only discredits the experts of Staff and OPC in favor of individuals paid thousands of dollars by the Company to support its position, it also attacks the DCF model for calculating Return on Equity ("ROE") when this has been the accepted method of calculating ROE's at the Commission, and a multitude of other state utility commissions, for over 30 years.

I. INTRODUCTION

It is well established that the Commission's decision on return on equity must abide by the dictates of two Supreme Court decisions. First, *Bluefield Water Works and Improvement Company v. Public Service Commission of the State of West Virginia* provides that:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties. . . . The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and supports its credit and enable it to raise the money necessary for the proper discharge of its public duties.¹

Approximately 20 years later, in *Federal Power Commission et al. v. Hope Natural Gas Company*, 320 U.S. 591 (1944), the Supreme Court pointed out that:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital²

As interpreted by Dr. Morin in his book *Regulatory Finance, Utilities Cost of Capital*:

The statements of the Court in the *Hope* and *Bluefield* cases established the following standards of fairness and reasonableness of the allowed rate of return for a public utility:

1. A standard of capital attraction
2. A standard of comparable earnings
3. Financial integrity.³

Additionally, when discussing the "standard of comparable earnings", these decisions obligate the Commission to review certain factors when determining an appropriate return on equity: (1) the proximity in time of the comparable return on equity; (2) the geographic proximity of the comparable return on equity; and (3) the corresponding risks and uncertainties. Finally, when considering the "financial

¹ 262 U.S. 679 (1923) at 692-693 (emphasis added).

² 320 U.S. 591 (1944) at 603 (emphasis added).

³ *Regulatory Finance, Utilities Cost of Capital*, Roger A. Morin (1994) at page 10.

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integrity standard", the Commission is obligated, under the *Bluefield* standard to consider an efficient and economical management.

As is apparent in the Report and Order, the majority failed each of the standards set forth in the *Hope* and *Bluefield* decisions. First, the majority, in analyzing the "standard of capital attraction", relied solely upon data from the 1st quarter of 2004 from the entire country. In doing so, the majority failed to consider more recent data and failed to restrict their review of comparable earnings to those returns on equity currently earned from "the same general part of the country."

Second, in relying solely upon the comparable company analysis presented by Empire Witness Vander Weide, the majority failed to consider the "standard of capital attraction" or "financial integrity" requirements. As was demonstrated by Staff, OPC and Empire's witness, the capital attraction standard merely requires a return on equity which in most instances, as supported by Empire's witness Murry, is well below 10.0%.⁴ As such, by failing to consider the other prongs from the *Hope* and *Bluefield* decisions, the majority authorized a return on equity that is clearly excessive and fails the statutory requirements that rates be just and reasonable.

Finally, in making its finding that "Empire's rates have been too low and must be increased", the majority failed to consider whether Empire's management meets the efficient and economical standard dictated by the *Bluefield* case. Evidence elicited in this proceeding clearly casts doubts regarding the decisions of Empire's management in the past 15 years to rely heavily on natural gas-driven electric generation. Given management's decision to rely heavily on natural gas generation and the attendant prices of that fuel, Empire's claims that it has been unable to reach its authorized return on equity should be summarily rejected.

II. STANDARD OF COMPARABLE EARNINGS

In its decision, the majority was obviously persuaded by the Company's claim that the national average ROE for electric utilities in 1st Quarter 2004 was 11.0%.⁵ Despite the majority's claim in this case as well as previous decisions that the Commission should not "unthinkingly mirror the national average",⁶ the majority undertake ROE manipulations to land on that exact 11.0% return on.

That said, any reliance, in March of 2005 on a national average ROE from the 1st Quarter of 2004 is obviously flawed and clearly dated. Despite their public availability, the majority made no effort to review return on equity decisions issued after the 1st Quarter of 2004. Interestingly, these decisions indicate that the national average has declined significantly in the year since the study was offered by Company's return on equity witnesses. Attached to this dissent is a review of the state utility commission return on equity decisions issued since July 1, 2004 (Attachment 1). This study indicates that the national average return on equity authorization is now approximately 10.45%. In fact, of the 21 decisions issued

⁴ See, Murray Direct at page 41 (8.29% to 9.29%); Allen Direct at page 22 (8.96% to 9.41%); Murry Direct, Schedule DAM-13 (5.70% to 7.53%), Schedule DAM-14 (5.80% to 5.88%), Schedule DAM-15 (7.16% to 8.99%), Schedule DAM-16 (7.26% to 7.34%); Schedule DAM-17 (7.70% to 13.53%) and Schedule DAM-18 (7.80% to 11.88%).

⁵ Report and Order at pages 12 and 45.

⁶ *Id.* at 46.

during that time period, only four commissions have adopted a return on equity as high as that authorized by the majority. On the other hand, eleven decisions have resulted in return on equity authorizations of less than 10.25%. This updated study clearly undermines the findings of the majority.

In addition to violating the requirement that the comparable earnings be "at the same time", the majority, by relying upon a national average return on equity study, violated the *Bluefield* requirement that comparable earnings be based upon those currently being made "in the same general part of the country." Again, a more timely and tailored analysis, as required by the *Bluefield* decision, would reveal that the standard of comparable earnings is met through an authorized return on equity well below that authorized in the current proceeding.

Of the recent orders which should have influenced the majority's decision, the most interesting is a recent decision of the Kansas Corporation Commission (KCC). On January 28, 2005, the KCC issued its decision regarding an electric rate increase request of Aquila Networks – WPK.⁷ In that decision, the KCC authorized a 10.5% return on equity.

This decision is interesting and applicable in that it, unlike the majority's comparable company study, directly complies with the dictates of the *Bluefield* and *Hope* decisions as described above. First, the Kansas decision is proximate in time in that it precedes the majority's decision by only 41 days. This compares noticeably to the comparable company study relied upon by the majority which is at least a year old. Second, the Kansas decision is proximate in geography in that it is a neighboring state and a state in which Empire has significant electric operations. Again, this contrasts with the comparable company study relied upon by the majority which forsakes geographic proximity and relies upon return on equity decisions from the entire country. Third, the Kansas decision involves an electric utility. By comparing to an electric utility, many of the risk adjustments that arise by comparisons across industry lines (i.e., gas versus electric) are eliminated. Therefore, the only risk adjustments that are necessary are those which account for specific risk differences between the companies.

The primary risk differences found between the Kansas decision, involving Aquila Networks – WPK, and the majority's decision involving Empire is a result of: (1) the relative capital structures of Aquila and Empire and (2) Aquila's risk associated with the junk bond status of its debt. As the KCC found, Aquila has a capital structure consisting of only 33.63% equity. As such, relative to Empire's 49.14% common equity ratio, Aquila Networks – WPK experiences significantly more risk. As such, based upon the financial risk associated with the relative capital structures, when making a comparable company comparison to this decision, it is apparent that, using the KCC decision as a comparable, Empire should be authorized a return on equity less than the 10.5% return on equity granted by the Kansas Commission.

Furthermore, it is well known regarding Aquila's recent financial struggles resulting from its exposure in the energy trading market. As a result of its participation in that market, Aquila has seen the downgrade of its debt instruments

⁷ Kansas Corporation Commission Case No. 04-AQLE-1065-RTS.

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to junk status. As a result, Aquila shareholders necessarily demand a higher return on equity than a Company, such as Empire, which has investment grade ratings for its debt instruments. Therefore, as with the capital structure comparison, it is obvious that Empire should be granted a return on equity less than the 10.5% authorized by the Kansas Commission for Aquila.

As can be seen, the majority's reliance upon the national average ROE study presented by the Company is misplaced. By the time of the majority's Report and Order, the study was clearly outdated. By failing to update the study or even acknowledge more recent utility decisions, the majority has run afoul of the *Hope* and *Bluefield* dictates that the decisions be comparable in time. Moreover, by relying solely upon a national average study, the majority failed the *Bluefield* requirement that the comparable companies be "in the same general part of the country." The majority's failure to undertake a more tailored and recent study of comparable return on equity decisions has left them without knowledge of decisions, such as that recently issued in Kansas, which are precisely on point and undermine the logic of the majority's decision. Perhaps more importantly, the use of such averages alone gives into the temptation to find an easy answer – simply conceding the Commission's judgment to other Commissions in other states.

III. RECENT MISSOURI RETURN ON EQUITY DECISION

The majority, in its Report and Order, failed not only to analyze comparable earnings "from the same general part of the country", it also failed to take into account those decisions issued in this same state.

On September 21, 2004, the same majority as that participating in the current decision issued its Report and Order in the latest Missouri Gas Energy (MGE) rate proceeding, Case No. GR-2004-0209. In that decision, the majority authorized MGE to earn a 10.5% return on equity. That decision is notable in that it undermines the very logic of the return on equity decision issued by the majority a mere five months later.

The relative risk profiles of MGE and Empire dictate that the Empire return on equity decision should have been significantly less than the 10.5% authorized for MGE. First, as was previously mentioned, Empire maintains a capital structure with over 49% common equity. In contrast, the Commission found that MGE's capital structure only consisted of 30% equity. The risk to shareholders associated with a highly leveraged capital structure is well understood. As a result of this risk, shareholders of such highly leveraged companies generally demand a higher return on equity. In spite of such basic financial tenets, the Commission authorized the less risky company, Empire, to earn a higher return on equity than the more risky MGE.

Second, Empire shareholders face less risk relative to MGE as a result of Empire's dividend policy. Regardless of earnings, Empire management has continued to make its dividend payout. As such, Empire shareholders are comforted in knowing that they may see a return on their investment in the form of stock appreciation as well as dividends. In contrast, MGE paid no dividend. As such, MGE shareholders are only capable of realized a profit through appreciation of their stock. This dividend payout policy results in Empire having a lower risk profile and should result in a lower return on equity authorization.

Third, it is recognized that Empire operates in the less risky electric industry and should have a lower return on equity than MGE. Specifically, while the gas industry faces competition from propane, it also faces significant competition from the electric industry for space heating. As a result, many residential and commercial customers have become entirely electric dependent and no longer rely upon gas utilities. In contrast, electric utilities, like Empire, are comforted in knowing that, while gas may provide a competitive heating alternative, there is not substitute for the electricity needed to power lights, appliances, televisions and computers. Given the less risky nature of the electric industry, it should be expected that the majority would give a lower return on equity to Empire relative to MGE.

IV. FAILURE TO ANALYZE CAPITAL ATTRACTION/COMMISSION USE OF THE DCF FORMULA

As previously mentioned, the *Bluefield* decision requires the Commission to review not only comparable earnings, but also the standard of capital attraction as well as financial integrity. In its Report and Order, the majority has expressly adopted the recommendation of the Empire return on equity witness as a starting point for its return on equity decision (“For this reason, the Commission will adopt Vander Weide’s recommendation of 11.3% as a starting point for determining Empire’s Cost of Common Equity.”)⁸ As further found by the majority:

Vander Weide used the comparable company approach and estimated Empire’s cost of equity in two steps. The comparable company approach estimates the subject company’s cost of common equity by identifying a group of companies of similar risk and then estimating the cost of equity for the companies in the proxy group . . . Of the four analysts, only Vander Weide performed the sort of risk-based comparative analysis *required* by Hope and Bluefield.⁹

The majority’s Report and Order runs afoul in that, as recognized by the above quote, it is based solely on the comparable company approach offered by Vander Weide. Interestingly, unlike the other return on equity witnesses in this proceeding, including Empire’s Witness Murry, Vander Weide never attempted to perform an analysis designed to satisfy the “standard of capital attraction.” As noted by Dr. Morin,

The attraction of capital standard, which focuses on investors’ return requirements, is applied through the DCF or market value method. This test defines fair return as the return investors anticipate when they purchase equity shares of comparable risk companies in the financial marketplace; this is a market-based rate of return, defined in terms of anticipated dividends and capital gains relative to stock prices.¹⁰

⁸ Report and Order at page 45.

⁹ Report and Order at pages 14 and 45.

¹⁰ Morin at page 13.

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The decision by the majority, to focus solely on the “standard of comparable earnings”, also represents a drastic departure from over 30 years of established Commission precedent to rely upon the DCF formula in analyzing the “standard of capital attraction”. As suggested by the Commission in a decision from **1975**, the Company has an obvious interest in inflating its return on equity recommendation.

The Commission finds the DCF approach is considerably more systematic and allows this Commission to treat all utilities which it regulated in a consistent manner. The use of the comparable earnings approach can be helpful, but the results of the analysis of an individual person can vary so significantly that reliance on that approach could result in a considerable variation in the treatment accorded various companies before this Commission. Since a company has only its own interests in mind it can tout the advantages of the comparable earnings approach. However, this Commission, having a number of utilities under its jurisdiction should be expected to give evenhanded consideration in its determination of an appropriate rate of return for those companies subject to its jurisdiction.¹¹

Given the objective nature of the DCF model, this Commission has unfailing utilized it in its determination of return on equity decisions for over 30 years. In fact, one questions, whether such an abrupt change in regulatory policy regarding the method for determining a return on equity, without sufficient explanation, violates the arbitrary and capricious standard to be applied by any reviewing court.

The DCF model has not only found steadfast acceptance by the Missouri Commission, it has also found universal acceptance by virtually all regulatory commissions. As Empire Witness Murry notes, “I used the Discounted Cash Flow (“DCF”) analysis, surely the most common method used in rate proceedings, as one method.”¹² Noted expert, David Parcell suggest that the DCF model is “the most commonly used.”¹³

Had the majority utilized the DCF model deemed appropriate by over 30 years of Commission precedent as well as universally accepted in utility regulation, it is unlikely that return on equity would have been a litigated issue. As Vander Weide notes in his direct testimony, a DCF analysis applied to companies comparable to Empire would result in a return on equity 9.9%.¹⁴ This study by Empire’s witness merely serves to highlight the reasonableness of the objective recommendation of Staff, a range based upon both a company specific DCF analysis (capital attraction standard) and a comparable company DCF analysis (comparable earnings standard) with a high recommendation of 9.29% return on equity.¹⁵

¹¹ *Re Missouri Public Service Company*, 20 Mo. P.S.C. (N.S.) 68, 108-109 (1975) (emphasis added).

¹² Murry Direct at page 7.

¹³ *The Cost of Capital – A Practitioners Guide*, by David C. Parcell, at page 8-1.

¹⁴ Vander Weide Direct, filed April 2004, at pages 29-30.

¹⁵ Murray Direct at page 41.

Today, the DCF model is now seriously suspect as the primary means of determining ROE in rate cases. Exactly what the majority is saying is now appropriate, is uncertain. And that reminds us that regulated companies often complain here about regulatory uncertainty as though it were a terrible albatross they must bear (of course they rarely mention that regulated companies face far more certainty than unregulated business on the open market). Ironically, here the majority has created much more uncertainty about the way to determine ROE. But that uncertainty is more likely to be a detriment to consumers than to the utilities.

V. CURRENT ECONOMIC CONDITIONS

On September 20, 2001, the Commission authorized Empire to earn a 10.00% return on equity. Since that time, general economic conditions have changes such to make the cost of equity for Empire much lower. Specifically, the discount rate has been reduced by the Federal Reserve from 2.50% to 2.25%. In addition, the Federal Reserve has reduced the Federal Reserve rate from 3.00% to 1.25%. Moreover, the average prime interest rate has been reduced by over 55% from 9.50% to 4.25%. This reduction in the cost of money has occurred at the same time as the rate of inflation has decreased.¹⁶ Clearly, the Federal Reserve has taken steps to ensure the availability of money to those entities seeking to access the capital markets.

Despite the ready availability of money, these market participants are not seeing significant competition from the debt markets for the available funds. Since the last Commission return on equity decision for Empire, the average yield on thirty-year U.S. Treasury Bonds has declined from 5.83% to 5.06%, approximately a 13% reduction. Moreover, specific to the utility industry, Mergent's Public Utility Bonds yields have decreased over 22% from 8.16% to 6.34%.¹⁷

Finally, given the most recent projections of inflation, it is unlikely that the Federal Reserve will take steps to tighten the supply of money in the capital markets. As Value Line notes, "Our sense is that we'll see a good deal of unevenness on the consumer and industrial sides. That mixed showing – assuming that it is accompanied by muted inflation – could persuade the Federal Reserve, which recently voted to raise a key lending rate for the second time this year, to go slowly on the rate front."¹⁸

In spite of the historic data since the Commission authorized a 10.0% return on equity in 2000 as well as the short-term economic projections indicating the ready availability of money, the majority has taken the illogical step of increasing Empire's authorized return on equity from 10.0% to 11.0%. This decision clearly ignores the economic conditions currently facing Empire's management and shareholders.

VI. ADOPTION OF COMPANY ROE RECOMMENDATIONS

Today's decision to reject the DCF in favor of the approach suggested by Empire is a dramatic departure from precedent. Adding to this departure from established

¹⁶ See, Schedules 1-4 of Murray Direct Testimony filed September 20, 2004.

¹⁷ *Id.* a Schedule 5.

¹⁸ *Id.* at page 15.

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policy is the majority's decision to adopt the recommendation of a Company witness. As was highlighted in the decision from 30 years ago, Company ROE witnesses have "only its own interests in mind." For this reason, the Commission has incessantly utilized the recommendations of its objective Staff as a starting point for any return on equity decision. As reflected in Attachment 2 to this dissent, the Commission, for at least 25 years, has steadfastly utilized the Staff recommendation as the appropriate starting point for any return on equity determination.

This case and the MGE case signal that the Commission now responds favorably to "true experts" (now being defined as in the old cliché as someone living far away and costing lots of money).

If these individuals did not have a track record of testifying nearly exclusively for companies and if they had been hired by a party without a monetary interest in the outcome, such "experts" could be very helpful. As it is they are suspect in their agenda and provide diminished assistance after discarding their prejudice. Staff and OPC witnesses, while having no flowering resume, presented to this Commission a straightforward analysis of the DCF model and adequate checks. Yet this was found lacking by the majority. After 25 years of steadfast acceptance by the Commission of its Staff's return on equity recommendations, the explicit rejection in the past two rate proceedings as well as the majority's insinuations regarding the credibility of such witnesses raises the following inevitable dilemma.

Given the decisions and dicta of the majority in the last two rate proceedings, the use of in-house Staff and OPC witnesses seemingly are no longer found useful by the majority. This means that the Staff and OPC must spend significant amounts of money hiring their own outside "experts" in the cases to come. Will this Commission authorize Staff to expend such funds? Will OPC – already under budget constraints – have the resources to pay for that luxury turned necessity? If not, then the book is written on ROE's in coming cases – the companies have already won by default for "experts" with adequate credibility will appear to contravene their position.

VII. EFFICIENCY OF EMPIRE MANAGEMENT

As previously indicated, the *Bluefield* and *Hope* decisions provide that the "return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."¹⁹ Therefore, in evaluating the ability of a company to attain its authorized return on equity, one must necessarily evaluate whether that utility's management is performing in an efficient and economical way.

In its Report and Order, the majority found that:

Empire's return on year-end common equity (ROE) has been relatively consistent from 1999 through 2003, except for 2001 when the ROE was 3.89%. Otherwise, the ROEs were in the 8 to 9 percent range. Empire's 2003 ROE of 8.79% was below

¹⁹ 262 U.S. 679 (1923) at 692-693 (emphasis added).

the average of a group of comparable at 13.78 percent for the year ending December 31, 2003.²⁰

* * * * *

The evidence is unrefuted that Empire's credit rating has been downgraded. The evidence also shows that Empire's access to capital has been correspondingly impaired, Empire must pay higher rates to borrow money. Its earnings per share have declined and it has not been able to realize the return on equity of 10.0% authorized in its last rate case. These facts are significant objective indicators that Empire's rates have been too low and must be increased.²¹

Rather than their blind acceptance of Empire's stated historical return on equity calculations as well as the long leap of logic based thereon that "Empire's rates have been too low and must be increased", the majority should have undertaken the task dictated by the *Bluefield* and *Hope* decisions and undertaken a review of whether Empire has been led by an "efficient and economical management."

Such a review would obviously indicate that Empire has failed to realize its authorized return on equity because of management's imprudent decision to rely heavily on natural gas generation. As indicated by Empire's Chief Executive Officer, "Thirty percent of the energy during the test year was generated from Empire's natural gas-fired units or purchased on the spot market. In recent years, the wholesale natural gas market has seen a substantial increase in prices. . . While less an issue during the last couple of years due to Empire's success in locking in low prices, the current long-term trend in gas prices would create substantial credit pressure if left unaddressed."²² Later, Empire's CEO notes that as a result of the position of certain parties on issues such as fuel and purchased power, "the Company, in the short run, cannot earn its allowed rate of return and will suffer financial harm that cannot be recovered."²³

Rather than blind acceptance of Empire's excuses for its failure to earn its authorized return on equity, it is necessary for the Commission to question Empire's decision to rely heavily on natural gas-fired generation. The evidence in this case indicates that Empire has added approximately 522 MW of capacity in the last 17 years, that capacity was entirely natural gas dependent.²⁴ Interestingly, Empire also claims that the limited steam production facilities owned by Empire, approximately 382 MW, 302 MW (79%) will be retired within the next 9 years. Despite (1) the limited amount of steam production generation; (2) Empire's stated plans to retire those facilities; and (3) Empire's tremendous dependence on natural gas, Empire's management indicates an intention to add further natural gas genera-

²⁰ Report and Order at pages 12-13.

²¹ Report and Order at 45.

²² Gibson Direct at page 6.

²³ Gibson Surrebuttal at page 2.

²⁴ Roff Direct, Tietjen Direct at Schedule JST-1.

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tion.²⁵ Moreover, other than the purchase of some wind energy which carries no capacity rating, Empire management has yet to present this Commission with definitive plans to obtain additional coal generation or to diversify away from their dependence on natural gas generation facilities.

The current regulatory model has been shown to work in Missouri. Electric utilities that have diversified and not become overly dependent on one fuel source have been in an era of declining costs and rate reductions. On the other hand, those utilities that have continued to rely solely upon natural gas generation are experiencing earnings volatility. This volatility in earnings is primarily a result of the utility's reliance on the volatile natural gas prices and not a reflection that the electric utility regulatory mechanism in Missouri is faulty and must be otherwise corrected through extravagant return on equity authorizations.

VIII. CONCLUSION

This case and the MGE case send a clear signal to the Missouri utility companies and their captive ratepayers, the welcome mat is out and the days of generally lower than average utility rates in Missouri are over. A wave of rate filings is now a certainty. Currently, Laclede Gas has a pending gas rate increase. Aquila has announced its plan to file an electric increase in May. The moratorium for AmerenUE expires at the end of this year. Given the return on equity authorizations recently seen out of the majority, the ratepayers (residential, commercial and industrial) will inevitably suffer.

This decision has further boxed in the Commission on the future of rates for Missourians. The health of Missouri utilities is important to all citizens, particularly those that are being served by them. Most Missouri companies are very healthy – some currently expanding through acquisitions under the same regulatory oversight and methodologies that the majority concludes must now change. But if a utility has put itself in a position of financial difficulty – through its own management decisions – the first answer should not be to raise the rates of the company consumers. Yet that is the first and last answer given by the majority here. We must disagree.

ATTACHMENT ONE

RECENT PUC DECISIONS (since July 1, 2004)

1. California American Water: stipulated to 10.1% ROE, decided 12-16-2004
2. San Jose Water Company, stipulated to 9.9% ROE, decided 8-19-2004
3. Southern California Water Company, stipulated to 9.9% ROE, decided 8-19-04
4. Aquila – Colorado, stipulated to 10.25% ROE, decided 8-17-04
5. Florida Public Utilities, decided at 11.25% ROE, decided 11-8-2004
6. Avista Corporation – Idaho, decided at 10.4%, decided 10-8-2004
7. South Beloit Water, Gas, and Electric, decided at 9.87%, decided on 10-6-2004
8. Indiana-American Water, decided at 9.25%, decided on 11-18-2004

²⁵ Tr. 1375.

9. Interstate Power & Light (Iowa), decided at 10.7%, decided on 1-14-2005
10. Aquila – Kansas, decided at 10.5%, decided on 1-28-2005 (only had 33.6% equity)
11. Delta Gas Company (Kentucky), decided at 10.5%, decided on 11-10-04
12. People's Water (Louisiana), decided at 10.04%, decided on 2-11-2005
13. Centerpoint Energy (Louisiana), decided at 10.25%, decided on 8-6-2004
14. Detroit Edison (Michigan), decided at 11.0%, decided on 11-23-2004
15. Interstate Power & Light (Minnesota), decided at 11.25%, decided on 7-1-2004
16. Southwest Gas Corp. (Nevada), decided at 10.25%, decided on 8-26-2004
17. South Jersey Gas, decided at 10.0%, decided on 7-8-2004
18. South Carolina Electric, decided at 10.7%, decided on 1-6-2005
19. Chattanooga Gas, decided at 10.2%, decided on 10-20-2004
20. Madison Gas & Electric, decided at 11.5%, decided on 12-22-2004
21. Wisconsin Public Service, decided at 11.5%, decided on 12-21-2004

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ATTACHMENT TWO**MoPSC Rate Case Decisions since 1980**

	Case Number	Staff Range	Company Range	Commission Ordered
KCPL	E0 -85-185	14.5% -15.7%	16.25%	15.0%
	ER -83-49	15.46% -16.25%	19.0%	16.25%
	ER -82-66	15.56% -16.42%	18.0%	15.76%
	ER -81-42	13.9% -14.8%	19.0%	14.4%
	ER -80-48	13.4% -14.2%	15.4%	13.4%
Union Electric	ER -84-168	15.5% -16.4%	17.0%	16.1%
	ER -83-163			Stipulated
	ER -82-52	15.11% -15.87%	17.0%	15.62%
	ER -81-180			Stipulated
Aquila Utility Corp/MPS	ER -2004-0034			Stipulated
	ER -2001-672			Stipulated
	ER -97-394	10.0% -11.0%	12.25%	10.75%
	ER -93-37			Stipulated
	ER -90-101	12.51% -12.84%	13.75%	12.84%
	E0 -86-83			Stipulated
	ER -83-40	14.0% -15.5%	16.0%	14.9%
	ER -82-39	14.9% -15.4%	17.5%	14.9%
	ER -81-85			Stipulated
	ER -79-60	12.97% -13.90%	15.5%	13.0%

	Case Number	Staff Range	Company Range	Commission Ordered
Empire District Elec.	ER -2002-424			Stipulated
	ER -2001-299	8.5% -9.5%	11.5-12.0%	10.0%
	ER -97-81			Stipulated
	ER -95-279			Stipulated
	ER -94-174			Stipulated
	ER -90-38			Stipulated
	ER -83-42	14.03-15.05%	16.5%	14.63%
	ER -81-209			Stipulated
	ER -79-19	12.8% -13.7%	13.25-13.7%	13.0%
St. Joseph Light & Power	ER -99-247			Stipulated
	ER -94-163			Stipulated
	ER -93-41	10.14-11.27%	12.78%	11.67%
	ER -81-43			Stipulated
Laclede Gas	GR -2002-356			Stipulated
	GR -2001-629			Stipulated
	GR -99-315	9.0-10.0%	12.75%	10.5%
	GR -98-374			Stipulated
	GR -96-193			Stipulated
	GR -94-220			Stipulated
	GR -92-165			Stipulated
	GR -90-120			Stipulated
	GR -84-161			Stipulated
	GR -83-233			Stipulated
	GR -80-210			Stipulated

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	Case Number	Staff Range	Company Range	Commission Ordered
MGE	GR-2004-0209	8.52-9.52%	12.0%	10.5%
	GR-2001-292			Stipulated
	GR-98-140	10.67-11.19%	12.00%	10.93%
	GR-96-285	11.30%	12.25%	11.30%
	GR-93-240			Stipulated
	GR-91-291	12.37%-12.84%	12.84%+	12.84%
	GR-90-50			Stipulated
	GR-87-89			Stipulated
	GR-81-155	14.4%-15.1%	16.0%	14.8%
	GR-80-173			Stipulated
SWBT	TC-93-224	10.62-11.72%	14.1%	11.72%
	TC-89-14	12.61-13.32%	14.5-15.5%	12.61%
	TR-86-84			Stipulated
	TR-83-253	14.65%	16.5%	14.70%
	TR-82-199	14.85-15.95%	17.1%	15.45%
	TR-80-256			Stipulated
GTE	TR-89-182	11.51-12.64%	13.7%	13.0%
	TR-89-106			Stipulated
	TR-85-176			Stipulated
	TR-82-23			Stipulated
United Telephone	TR-93-181	11.7-12.30%	13.66%	11.7%
	TR-90-273			Stipulated
	TR-85-179			Stipulated
	TR-80-235	11.6-11.9%	17.0%	11.9%

	Case Number	Staff Range	Company Range	Commission Ordered
MO-American Water	WR-2003-0500			Stipulated
	WR-2000-281	9.50-10.75%	11.65%	10.0%
	WR-97-237			Stipulated
	WR-95-205	11.2-12.15%	12.25%	11.48%
	WR-91-211			Stipulated
	WR-89-265			Stipulated
Missouri Cities Water	WR-92-207	11.63-12.62%		12.09%
	WR-91-172	12.73-13.25%	15.5%	13.01%
	WR-90-236			Stipulated
	WR-83-14	13.5-14.5%	18.5%	14.5%
	WR-81-280			Stipulated
	WR-78-107			Stipulated
St. Louis County Water	WR-2000-844	10.25-11.25%	12.0%	10.75%
	WR-97-382			Stipulated
	WR-96-263	10.74-11.05%	12.75%	11.60%
	WR-95-145	11.1-11.6%	12.75%	11.6%
	WR-94-166			Stipulated
	WR-89-246			Stipulated
	WR-87-2			Stipulated
	WR-78-276	11.8%	15.0%	11.8%

Of the 87 major rate cases reported in the last 25 years, 38 of the cases were litigated. In none of these reported decisions did the Commission adopt the recommended ROE of a Company witness.

CONCURRING OPINION OF COMMISSIONER LIN APPLING

I write in response to the Dissenting Opinion of my fellow Commissioners, Steve Gaw and Robert Clayton, III. Like them, I took an oath before taking up my duties at this Commission, to faithfully and honestly discharge the duties of my office.¹ Chief among these duties is to be fair, “fair to the public, and fair to the investors.”² Having served my country as a military officer for most of my adult life, I do not take oaths lightly.

Thus, I am disappointed to learn that my dissenting colleagues believe the majority made a decision in this case that was not fair, that was based on “blind acceptance” of company testimony and that predisposes the majority to hurt utility ratepayers in the future. Having made my decision strictly on the basis of what I heard in the hearing room and read in the briefs and other pleadings filed by the parties, I do not take this challenge lightly.

The dissenting Commissioners criticize several aspects of the majority's findings, including: 1) the chosen return on equity capital (ROE); 2) lack of adherence to regulatory principles in the *Hope* and *Bluefield* decisions; 3) inconsistency with earlier Commission decisions; and 4) failure to rely upon the Discounted Cash Flow (DCF) method of analysis. I respectfully disagree with their opinions.

Return on Equity

The cost of common equity was, as it always is, a contest of experts. Company witness Murry recommended 12%, Company witness Vander Weide recommended 11.3% and the Company's position was 11.65%, the midpoint between its two witnesses. Office of the Public Counsel (OPC) witness Allen suggested a range of 8.96% - 9.41%, and PSC Staff witness Murray suggested a range of 8.29% - 9.29%. These positions were on either side of the industry average of 11.00%.

It was clear to me from the hearing and the prefiled testimony that Empire's rates have been too low and that the company has suffered from inadequate capitalization. Its credit rating had been downgraded, making the cost of borrowed money higher.³ It had paid out more in dividends every year than it earned. In my opinion, it was inadequate capitalization and declining borrowing ability that led Empire to an over-reliance on gas-fired generation – it's cheaper to build! In hindsight, it's easy to say that the Company should not have made itself so vulnerable to gas price fluctuations.

Further, the decisions made over the last 17 years to invest in gas-fired generation began at a time when natural gas prices were very low. Only recently has the natural gas market become the volatile creature that the Dissent frequently cites to. It is inappropriate, in my opinion, for the Dissent to assert such sharp criticism of Empire's management decisions with 20/20 hindsight. I don't think it

¹ Section 386.110, RSMo 2000.

² *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 345, 272 S.W. 971, 973 (banc 1925).

³ The Dissenters allege that “the majority failed to consider the ‘standard of capital attraction’ or ‘financial integrity’ requirements.” In fact, those are exactly the things I considered.

was mismanagement for the Company to build the type of generation it could afford, looking at the total economic environment of the last 17 years. Living within your means is good management.

In thinking through this case and the contrary opinions of the common equity experts, it was reasonable to find that the Company's return needed to be higher than it has been. In this process, the industry average served as a guide. The common equity figures offered by Staff and Public Counsel were below the national average, and that makes no sense to me. If anything, Empire seems like a less attractive investment than the average electric utility.

The recommendations of the Company experts were both above the average, seemed about right in view of Empire's credit rating downgrade, high dividend-to-earnings ratio and increased risk factors that the market attributes to Missouri's regulatory environment. For this reason, I found Vander Weide's recommendation to be more persuasive than those offered by the other witnesses and to be a good place to start. The majority agreed to reduce Vander Weide's recommendation of 11.3% to adjust for two decisions that reduced Empire's regulatory risk: 1) using the accrual method for net salvage to allow partial recovery of the Company's net salvage totals; and 2) and implementing an Interim Energy Charge to recover a portion of the volatile costs of natural gas. In my opinion, this is not "blind acceptance" of the Company's testimony.

Hope and Bluefield Principles

The Dissenters state: "when discussing the 'standard of comparable earnings', these decisions (i.e., *Hope* and *Bluefield*)⁴ obligate the Commission to review certain factors when determining an appropriate return on equity: (1) the proximity in time of the comparable return on equity; (2) the geographic proximity of the comparable return on equity; and (3) the corresponding risks and uncertainties. Finally, the Dissenters claim, when considering the "financial integrity standard", the Commission is obligated under the *Bluefield* standard to consider an efficient and economical management." They say we did not do this.

Unlike my colleagues in their dissent, I relied on what I heard during the hearing and read in the case papers submitted and accepted into evidence. That is what my oath requires. The dissenting Commissioners did not restrict themselves to the evidence of record. In scolding the majority for relying on the 11.00% ROE cited above — which is in the record — they point to contrary indicators which were not in evidence. That is not an appropriate criticism. The Dissenters are lawyers, and they know that the Commission's decision must be based on the evidence in the but Vander Weide was not very far above it. Vander Weide's recommendation record.⁵

If the record did not include information of appropriate geographic or temporal proximity, that is the fault of the parties. Perhaps they will do better next time.

⁴ *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

⁵ The Dissenters state: "any reliance, in March of 2005 on a national average ROE from the 1st Quarter of 2004 is obviously flawed and clearly dated. Despite their public availability, the majority made no effort to review return on equity decisions issued after the 1st Quarter of 2004."

Earlier Commission Decisions and DCF Analysis

The Dissenters are disturbed by the majority's "drastic departure from over 30 years of established Commission precedent to rely upon the DCF formula in analyzing the 'standard of capital attraction.'" The DCF model, as the majority's Order explains, is the chief example of the market-determined standard.⁶ It is a method that has been relied on by this and other Commissions for many years in determining the cost of common equity. But it is not the *only* method. As the majority pointed out in the Commission's Order, The Constitution "does not bind ratemaking bodies to the service of any single formula or combination of formulas."⁷

As noted earlier, the Commission's Staff advocated the lowest cost of common equity figures of any of the parties. It is difficult to understand why Staff's return on equity recommendation is lower than that offered by the Public Counsel, yet that has been the trend recently.

Staff expert Murray's company-specific, DCF-derived, cost-of-common-equity estimate for Empire was a range of 8.29% - 9.29%. His DCF analysis of a proxy group resulted in an estimated average cost of common equity ranging from 7.17% - 8.62%. Using two versions of the Capital Asset Pricing Model (CAPM), Murray produced two estimated costs of common equity for Empire, 7.04% and 9.35%. His CAPM analyses of the proxy group produced results of 7.35% and 10.01%. Finally, Murray performed a Risk Premium analysis on Empire and produced an estimated cost of common equity of 9.23%. From this constellation of nine results, Murray offered the range 8.29% to 9.29% — the results of his company-specific DCF analysis of Empire — as his final recommendation to the Commission.

I am not persuaded by this method. It is not comparative, does not properly account for risk and does not allow the Company to pay its operating costs while also providing its shareholders with an opportunity to earn an adequate return on their investment.

As to the issue of an "efficient and economical management", I note that there was no prudence issue in this case. In fact, the most striking evidence that I recall as to management's efficiency and economy had to do with Empire's excellent natural gas hedging program. It seems to me that the record shows that Empire's management has done a good job, especially considering recent market trends in natural gas pricing.

If appealed, the courts will examine the Commission's order in this case to determine whether it is reasonable.⁸ By "reasonable," the courts mean that the order must be "supported by substantial and competent evidence on the whole record."⁹ "Reasonable" also encompasses an inquiry into whether the decision

⁶ C.F. Phillips, Jr., *The Regulation of Public Utilities*, 394-396 (1993).

⁷ *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037, 1049-50 (1942).

⁸ *AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. banc 2003).

⁹ *St. ex rel. Laclede Gas Co. v. PSC of Mo.*, 2005 Mo. App. LEXIS 343, 17-18 (Mo. Ct. App., W.D. 2005); *St. ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 528 (Mo. App., W.D. 1997).

was “arbitrary, capricious, or unreasonable, or whether the [Commission] abused its discretion.”¹⁰ Whether an order “is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. An [order] that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.”¹¹

The Dissenting Opinion, unlike the majority's Order, will not be reviewed at all. The dissenting Commissioners need not restrict themselves to the evidence of record but are free to scold the majority for doing so. This is like playing trump cards that the rest of us have not seen.

The Dissenters say that the Commission's decision in this case “sends a reward package to the Company, paid for without consent by the citizens and businesses of southwest Missouri.” I disagree. I say that the Commission's decision in this case sets just and reasonable rates that are fair to the Company as well as to the ratepayers, firmly founded on the evidence of record and not contrary to the overwhelming weight of the evidence in this case. To the extent that the Dissenters urge this Commission to ignore the record and base its decision on information outside the record, they are in error.

For these reasons, I respectfully concur.

¹⁰ *Id.*

¹¹ *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003).

In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area.

*Case No. ER-2004-0570
Decided April 7, 2005*

**ORDER CONCERNING APPLICATIONS FOR REHEARING
AND MOTIONS FOR CLARIFICATION OR
RECONSIDERATION**

Procedural History:

On April 30, 2004, The Empire District Electric Company submitted to the Missouri Public Service Commission certain proposed tariff sheets, Tariff File No. YE-2004-1324. Following an evidentiary hearing, the Commission issued its Report and Order on March 10, 2005, effective March 27, rejecting the proposed tariff sheets filed by Empire. Empire filed compliance tariffs on March 17, which were approved on March 21, effective on and after March 27.

The Commission's Staff filed its Motion for Clarification on March 21. On March 25, the Public Counsel filed his Application for Rehearing; the Missouri Industrial Energy Consumers filed their Motion for Clarification and Alternative Application for Rehearing; Praxair and Explorer Pipeline filed their Application for Rehearing, Reconsideration or Clarification; and Empire filed its Application for Rehearing.

Clarification:

The Commission will grant clarification in two respects.

First, Staff's Motion for Clarification will be granted. Its purpose is to implement the Commission's decisions as to depreciation.

Second, several parties requested clarification as to the Commission's position on the Discounted Cash Flow Method widely used by experts in developing opinions as to an appropriate return on equity. The Commission states that its resolution of the present case is founded on the record developed in this case and its application thereto of controlling law. It is intended only to resolve the issues presented in this case. The Commission does not intend to abandon or discourage use of the Discounted Cash Flow Method in the future and expects to hear expert testimony based on the use of this method in future cases.

Reconsideration and Rehearing:

Having considered the parties' requests for reconsideration and applications for rehearing, the Commission is of the opinion that the same should be denied.

IT IS THEREFORE ORDERED:

1. That the Motion for Clarification filed by the Staff of the Missouri Public Service Commission on March 21, 2005, is granted. The Empire District Electric Company is directed to comply with the requests contained in Staff's motion.
2. That Clarification is granted, as several parties requested, as discussed above.
3. That the several Applications for Rehearing and for Reconsideration timely filed herein by The Empire District Electric Company, the Public Counsel, Praxair, Inc., and Explorer Pipeline Company, and the members of the Missouri Industrial Energy Consumers, are denied.
4. That this order shall become effective on April 7, 2005.

Davis, Chm., Murray and Appling,
CC., concur.
Gaw and Clayton, CC., dissent.

Thompson, Deputy Chief Regulatory Law Judge

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In the Matter of the Application of Union Electric Company for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain Electric Plant, as Defined in Section 386.020(14), RSMo, to Provide Electric Service in a Portion of New Madrid County, Missouri, as an Extension of Its Existing Certificated Area.

Case No. EA-2005-0180

Decided March 10, 2005

Electric §3. The Commission granted Union Electric Company, doing business as AmerenUE, a Certificate of Convenience and Necessity for an expansion of its service area in New Madrid County.

Electric §20. The Commission concluded that the proposed Large Transmission Service tariff should be approved, on an interim basis, for service rendered to Noranda Aluminum, Inc., on and after June 1, 2005, but only until such time as the Commission issues its final order in the next case to consider UE's rates.

Electric §24. The Commission approved a Stipulation and Agreement, allowing Union Electric Company, doing business as AmerenUE, to extend its service area in order to supply power to Noranda Aluminum, Inc.

ORDER APPROVING STIPULATION AND AGREEMENT

Procedural History:

On December 20, 2004, Union Electric Company, doing business as AmerenUE ("UE"), filed its Application for a Certificate of Convenience and Necessity for an expansion of its service area in New Madrid County. In its Application, AmerenUE states:

The area sought to be certificated by AmerenUE encompasses the aluminum smelting plant facility owned by Noranda Aluminum, Inc ("Noranda"). Noranda's current electric supply arrangements expire May 31, 2005. Noranda has requested that AmerenUE supply it with electrical service to meet Noranda's electric power and energy needs for a minimum term of fifteen (15) years commencing June 1, 2005. AmerenUE does not hold a certificate of public convenience and necessity for the area encompassing Noranda's premises. Therefore, it is necessary for AmerenUE to obtain a certificate of public convenience and necessity for this area.

Together with its Application, AmerenUE filed the prepared direct testimony of several witnesses, a Motion for Expedited Treatment, and a Motion for Adoption of an Expedited Procedural Schedule. The Commission granted those motions on January 4, 2005, and established an expedited procedural schedule designed to facilitate determination of this matter by March 21, 2005, the date urged by UE.

Notice and an opportunity to intervene was given, and several entities applied to intervene. On January 25, the Commission granted intervention to the Missouri Energy Group,¹ the Missouri Industrial Energy Consumers,² and the Missouri Joint Municipal Electric Utility Commission.³ The Commission had previously made Noranda Aluminum, Inc., a party. Pursuant to the procedural schedule, the parties filed prepared testimony and Trial Briefs. The parties also filed legal memoranda addressing the Commission's jurisdiction to grant the requested relief on January 18. On February 22, the Commission convened an evidentiary hearing, which was recessed on February 23 upon the parties' representation that a settlement had been reached.

On February 24, the parties filed a Unanimous Stipulation and Agreement resolving all issues. The parties agree that the Application should be approved and UE should be granted a Certificate of Convenience and Necessity to serve Noranda. In general, the agreement provides that, prior to UE's next general rate or complaint case, Noranda will be served on an interim basis as a Missouri retail electric customer of UE pursuant to the proposed Large Transmission Service ("LTS") tariff, an illustrative copy of which was attached to the agreement. That tariff, and the terms under which service is provided to Noranda, are subject to review in AmerenUE's next general rate case, complaint case, or rate design case. The parties also agree that service to Noranda shall be treated for ratemaking purposes and for determination of prudence like service to any other Missouri retail customer of UE. Staff filed Suggestions in Support of the Stipulation and Agreement on March 2.

Discussion:

This case concerns a proposed power supply contract between UE and Noranda, an aluminum smelter located at New Madrid, Missouri, that consumes a great deal of electric power in its industrial operation. The filings of record in this matter allege that Noranda's current power supply contract expires on May 31, 2005, and that Noranda is therefore seeking a new power supply source. UE and Noranda propose to enter into a 15 year power supply agreement whereby UE would supply power to Noranda over existing facilities pursuant to a proposed new LTS tariff that is generally similar to UE's existing Large Primary Service ("LPS") tariff. The service area extension sought by UE encompasses Noranda's pre-

¹Barnes-Jewish Hospital, Buzzi Unicem USA, Inc., Emerson Electric Company, Holcim US, Inc., SSM HealthCare, and St. John's Mercy Health Care.

²Anheuser-Busch Companies, Inc., The Boeing Company, DaimlerChrysler, Ford Motor Company, General Motors Corporation, Hussmann Refrigeration, J.W. Aluminum, Monsanto Company, Pfizer, Precoat Metals, Procter & Gamble Manufacturing, Nestlé Purina, and Solutia.

³The Missouri Joint Municipal Electric Utility Commission filed a motion for leave to withdraw from the case on February 18, 2005. That motion is granted herein.

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mises and Noranda is the sole landowner in the area for which certification is sought. Some of the facilities that UE would use to deliver power to Noranda belong to a third party with whom UE already has an Interchange Agreement permitting such use.

The Commission may grant a certificate "whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service."⁴ This authority applies where, as here, a utility seeks to extend its existing service area.⁵ It has been said that the term "necessity" does not mean "essential" or "absolutely indispensable," but rather that an additional service would be an improvement justifying its cost.⁶ As for the term "convenient," the inquiry is whether "the inconvenience of the public occasioned by the lack of [service] is sufficiently great to amount to a necessity."⁷ Finally, "it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate."⁸

The above principles are generally applicable to cases involving an application for a certificate of convenience and necessity. However, the present case is complicated by the existence of Section 91.026, RSMo Supp. 2004, which was enacted recently by the Missouri General Assembly with Noranda in mind. This is the first case to be brought under this new statute.

Section 91.026, RSMo Supp. 2004, provides in pertinent part:

* * *

2. Notwithstanding any provisions of law to the contrary, any aluminum smelting facility shall have the right to purchase and contract to purchase electric power and energy and delivery services from any provider, wherever found or located, at whatever rates or charges as contracted for, and such periods or times as is needed or necessary or convenient for the operation of such aluminum smelting facility and for no other purpose, notwithstanding any past circumstances of supply. Any aluminum smelting facility purchasing or contracting to purchase electric power and energy pursuant to this section shall not resell such electric power and energy to any party except the original providers of such electric power and energy.

⁴ Section 393.170.3, RSMo 2000.

⁵ *St. ex rel. Doniphan Telephone Co. v. P.S.C.*, 377 S.W.2d 469, 474 (Mo. App., K.C.D. 1964).

⁶ *St. ex rel. Intercon Gas, Inc. v. Public Service Com.*, 848 S.W.2d 593, 597-598 (Mo. App., W.D. 1993); *St. ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App., K.C.D. 1973).

⁷ *St. ex rel. Beaufort Transfer Co. v. Clark*, *supra*; *St. ex rel. Transport Delivery Co. v. Burton*, 317 S.W.2d 661 (Mo. App., K.C.D. 1958).

⁸ *St. ex rel. Intercon Gas*, *supra*; *St. ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n*, 527 S.W.2d 390, 392 (Mo. App., K.C.D. 1975).

3. Notwithstanding the provisions of section 91.025, section 393.106, RSMo, and section 394.315, RSMo, to the contrary, any provider of such electric power and energy and delivery services, whether or not otherwise under Missouri regulatory jurisdiction, shall have the right to transact for and sell electric power and energy and delivery services to an aluminum smelting facility. Any transactions or contracts pursuant to this section for electric power and energy and delivery services shall not be subject to the jurisdiction of the commission with regard to the determination of rates.

4. When current electric power and energy is being supplied in part or in whole by a municipally owned utility and in part or whole by an electric generating cooperative owned by rural electric cooperatives and not under any contract authorized pursuant to this section, a replacement contract pursuant to the provisions of subsections 2 and 3 of this section shall provide for all of the electric power and energy and delivery services requirements of the aluminum smelter and shall meet the following criteria:

(1) The aluminum smelting facility's change of supplier shall have no negative financial impact on any past supplier or suppliers or to other electricity customers of such supplier or suppliers;

(2) The supply arrangements made by the aluminum smelting facility when operated in coordination with the local electric infrastructure shall not reduce the reliability of service to other customers or the safety of any person;

(3) The aluminum smelting facility's change of electric supplier shall not cause a reduction in tax revenue to the state of Missouri or any political subdivision;

(4) No billing or metering functions of any municipally owned utility will be changed or affected as a result of a change of electric supplier by such aluminum smelting facility.

* * *

Subsections 2 and 3 of Section 91.026, RSMo Supp. 2004, do not require Commission approval. It appears, as well, that the "provider of such electric power and energy and delivery services" under such a power supply contract has no need for a certificate of public convenience and necessity from this Commission. The existence of a power supply contract appears to be the only authority that the parties require to proceed under Section 91.026, RSMo Supp. 2004.

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All of the parties except the Public Counsel took the position that UE and Noranda could proceed under either Section 91.026, RSMo Supp. 2004, or Section 393.170.3, RSMo 2000, as they may elect. Public Counsel originally asserted that the parties may only proceed under Section 91.026, RSMo Supp. 2004, but dropped his opposition to the certificate prior to the hearing on February 22. The parties now unanimously agree that the Commission should grant the requested certificate.

By the time of the hearing, the only contested issue was the proposed LTS Tariff. UE contended that the proposed tariff was essentially similar to its existing LPS Tariff, with certain adjustments reflecting Noranda's high load factor, the magnitude of its power purchases and the fact that it will not use any of UE's distribution facilities. The areas of disagreement were resolved through negotiation, as the pending Stipulation and Agreement demonstrates.

The proposed tariff was modified in several respects. The service criteria, which as originally drafted only Noranda could satisfy, are now the same as the LPS Tariff. The load factor has been reduced from 98 percent to 95 percent. The tariff provides that transmission service from a third-party provider will be paid for separately. The Annual Contribution Factor ("ACF") will now be calculated to provide UE an annual net bundled kilowatt-hour realization of "not less than" \$0.0325/kWh (3.25 cents per kilowatt-hour), after appropriate Rider C adjustments. Thus, \$0.0325/kWh is now only a floor and not also a ceiling for the LTS Tariff rate. The former proposed language that the ACF shall be eliminated effective upon a Commission order in a complaint case, rate case or any other regulatory proceeding where AmerenUE's rates for its bundled service classification are changed, has been dropped. The special credit provisions of the original proposed LTS Tariff are retained in the revised LTS tariff. The fifteen-year term, five-year termination notice and annual renewal provisions of the original LTS Tariff also continue in the revised LTS Tariff.

The Commission has considered UE's Application, the Unanimous Stipulation and Agreement, and Staff's Suggestions. The Commission is of the opinion that the requested extension of UE's service area is necessary and convenient for the public service and should be granted. The Commission further finds that the proposed LTS Tariff should be approved, on an interim basis, for service rendered on and after June 1, 2005, but only until such time as the Commission issues its final order in the next case to consider UE's rates, whether initiated by tariff filing or by complaint. UE is directed to file proposed sheets in compliance with the Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. That the Motion for Leave to Withdraw as a Party filed on February 18, 2005, by the Missouri Joint Municipal Electric Utility Commission is granted.
2. That the Application for a Certificate of Convenience and Necessity for an expansion of its service area in New Madrid County filed on December 20, 2004, by Union Electric Company, doing business as AmerenUE, is granted as described above.
3. That the Unanimous Stipulation and Agreement filed herein on February 24, 2005, is approved. The parties are directed to comply with the terms of the Stipulation and Agreement.

4. That Union Electric Company, doing business as AmerenUE, shall file proposed tariff sheets to implement the Large Transmission Service (LTS) Tariff described in the Stipulation and Agreement filed on February 24, 2005, and illustrated by an attachment to that Stipulation and Agreement.

5. That Union Electric Company, doing business as AmerenUE, shall immediately notify this Commission and its Staff in the event that Noranda Aluminum, Inc., exercises its right to cancel their power supply agreement.

6. That Union Electric Company, doing business as AmerenUE, shall file, no later than 4:00 p.m. on June 1, 2005, documentation demonstrating that it has sufficient capacity to serve its native load, including Noranda Aluminum, Inc., and to maintain at least a 15 percent reserve at all times.

7. That this order shall become effective on March 20, 2005.

Davis, Chm., Murray, Gaw, Clayton, and Appling, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of an Investigation into the Provisioning of Expanded Local Calling Plans in the Rural Areas of Missouri.*

*Case No. TO-2003-0297
Decided March 10, 2005*

Telecommunications §1. The Office of the Public Counsel filed a motion requesting that the Commission “provide for expanded local calling scopes in the rural areas of Missouri” and that the Commission establish a procedure for the creation of these plans. The Commission instead determined that this case could be closed because the Commission is in the process of implementing an administrative rule, in Case No. TX-2005-0194, that will address the concerns raised by the Office of the Public Counsel.

Telecommunications § 30. The Office of the Public Counsel filed a motion requesting that the Commission “provide for expanded local calling scopes in the rural areas of Missouri” and that the Commission instead establish a procedure for the creation of these plans. The Commission determined that this case could be closed because the Commission is in the process of implementing an administrative rule, in Case No. TX-2005-0194, that will address the concerns raised by the Office of the Public Counsel.

ORDER CLOSING CASE

On February 25, 2003, the Office of the Public Counsel filed a motion requesting that the Commission “provide for expanded local calling plans in the rural areas of Missouri” and that the Commission establish a procedure for the creation of these plans. In order to address various issues regarding the Metropolitan Area Calling Plan and calling scopes in general, the Commission opened a Task Force case, TW-2004-0471. The Task Force filed its Final Report and Recommendation, along with supplemental comments, on September 29, 2004. Among other things, the Task Force recommends that the Commission promulgate a rule and implement a process to entertain requests for the establishment of new expanded calling plans or changes to existing expanded calling plans. The Final Report contains various guidelines as to what the Task Force thinks should be included in this rule or process.

The Commission subsequently initiated a rulemaking case, TX-2005-0194, *In the Matter of Proposed Rule 4 CSR 240 2.061, Applications for Expanded Local Calling Area Plans within a Community of Interest*. On March 4, 2005, the Commission filed its proposed rule with the Missouri Secretary of State's Office. The proposed rule in Case No. TX-2005-0194 is very similar to the suggestions found in the Task Force Final Report in Case No. TW-2004-0471. The proposed rule will be published in the April 15, 2005 edition of the *Missouri Register*, and comments regarding the proposed rule are due May 15, 2005. The Commission will conduct a Public Hearing regarding the proposed rule on May 16, 2005.

* See pages 406, 437 and 460, Volume 12 MPSC 3d, for orders in Case No. TW-2004-0471.

The Commission subsequently directed Public Counsel to file a pleading addressing whether or not the instant case, Case No. TO-2003-0297, should be closed. Public Counsel filed its response on February 7, 2005. Public Counsel acknowledges that the proposed rule in Case No. TX-2005-0194 "goes far to initiate the relief sought by Public Counsel." Nonetheless, Public Counsel requests that the Commission not dismiss the case, but instead stay any action pending a final rulemaking and action on the expanded calling scope requests regarding Greenwood, Lexington, Ozark, Rockaway Beach, and the expansion of the St. Louis MCA.

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, filed its reply on February 14, 2005. SBC Missouri suggests that the Commission should dismiss this case as a proposed rule is in progress that will address all of the concerns Public Counsel raises in Case No. TO-2003-0297. SBC Missouri also points out that interested entities will have an opportunity to file comments in that rulemaking case.

Upon review, the Commission believes that the rule in progress in Case No. TX-2005-0194 will address the concerns raised by Public Counsel in this case, Case No. TO-2003-0297. Furthermore, the Commission finds that it is not necessary or beneficial to keep this case open pending a final rulemaking or resolution of the requests regarding Greenwood,¹ Lexington,² Ozark,³ Rockaway Beach,⁴ and the St. Louis MCA.⁵ Therefore, the Commission will close this case.

IT IS THEREFORE ORDERED:

1. That this order shall become effective on March 20, 2005.
2. That this case may be closed on March 21, 2005.

Davis, Chm., Murray, Gaw, Clayton, and Appling, CC., concur.

Ruth, Senior Regulatory Law Judge

¹ Case No. TO-2005-0144.

² Case No. TO-2005-0142.

³ Case No. TO-2005-0143.

⁴ Case No. TO-2003-0257.

⁵ Case No. TO-2005-0141.

Big River Telephone Company, LLC, Birch Telecom of Missouri, Inc., ionex communications, Inc., NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., and Xspedius Communications, LLC, Complainants, v. Southwestern Bell Telephone, L.P. dba SBC Missouri, Respondent.*

Case No. TC-2005-0294

Decided March 17, 2005

Telecommunications §36. With jurisdiction and acts pursuant to 47 U.S.C. Sections 251 and 252, as well as Section 386.310, RSMo 2000, the Commission ordered SBC Missouri to continue accepting and processing new orders, moves, adds, and changes to the Coalition members' and intervenors' existing embedded customer base, under the rates, terms and conditions of their respective M2A or M2A-derived Agreements. SBC was also ordered to process requests for Unbundled Network Elements when the requesting carrier has self-certified. Further, the Commission ordered the companies to comply with the Federal Communications Commission's Triennial Review Remand Order until their Interconnection Agreements have been amended.

Telecommunications §46. With jurisdiction and acts pursuant to 47 U.S.C. Sections 251 and 252, as well as Section 386.310, RSMo 2000, the Commission ordered SBC Missouri to continue accepting and processing new orders, moves, adds, and changes to the Coalition members' and intervenors' existing embedded customer base, under the rates, terms and conditions of their respective M2A or M2A-derived Agreements. SBC was also ordered to process requests for Unbundled Network Elements when the requesting carrier has self-certified. Further, the Commission ordered the companies to comply with the Federal Communications Commission's Triennial Review Remand Order until their Interconnection Agreements have been amended.

ORDER REGARDING CONTINUED PROVISIONING OF SERVICE

On March 3, 2005, Big River Telephone Company, LLC, Birch Telecom of Missouri, Inc., ionex communications, Inc., NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., and Xspedius Communications, LLC (referred to as the "CLEC Coalition") filed a complaint against Southwestern Bell Telephone, L.P. dba SBC Missouri.

On March 10, 2005, the Commission issued an order requiring SBC Missouri to continue accepting and processing new orders, moves, adds, and changes to the Coalition members' existing embedded customer base, under the rates, terms and conditions of their respective M2A or M2A-derived Agreements. That order expires on March 18, 2005.

On March 16, 2005, the Commission convened an oral argument. Based upon the allegations in the complaint and the arguments presented, the Commission determines that it must act to ensure that SBC Missouri does not pursue a course of action contrary to the Federal Communications Commission's Triennial Review

* On April 11, 2005, the Complainants dismissed their complaint.

Remand Order (TRRO).¹ The Commission has jurisdiction and acts pursuant to 47 U.S.C. Sections 251 and 252, as well as Section 386.310, RSMo 2000.

SBC Missouri, at the oral argument and in its response, argues that the Commission has no authority to take the actions urged by the CLEC Coalition. SBC Missouri argues that to do so would be akin to the Commission granting an injunction, a form of equitable relief beyond the Commission's authority. But when SBC Missouri wanted the Commission to take action akin to an injunction in Case No. TC-2001-20, it did not hesitate to ask the Commission to do so. In that case, on the basis of a letter from Mid-Missouri Telephone Company threatening to terminate trunk lines between it and SBC Missouri, SBC Missouri (then Southwestern Bell Telephone Company) asked the Commission to issue an order enjoining Mid-Missouri from taking the actions it threatened. SBC Missouri alleged that it would suffer harm if those threatened actions took place, and asserted that the Commission had jurisdiction to enjoin Mid-Missouri's actions pursuant to Section 386.250 and 392.240, RSMo 2000. The Commission discussed its authority to take the action SBC Missouri requested:

The Commission has concluded that Section 386.310 is the statute under which SWBT invokes the Commission's authority. Section 1 of this statute states, in essence, that the Commission may provide for expeditious issuance of an order in any case in which the Commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property, provided that the Commission shall include in such an order an opportunity for hearing as soon as practicable after the issuance of such order. Commission orders issued pursuant to the authority in Section 386.310 are essentially a form of injunctive relief which has specifically been authorized by the legislature to be exercised by the Public Service Commission.

The actions that SBC Missouri now argues are beyond the Commission's authority are precisely the actions that SBC Missouri, less than five years ago and under the same statutory scheme, asked the Commission to take with respect to Mid-Missouri. The Commission determines that it does indeed have the authority that SBC Missouri thought it had in TC-2001-20 when it was to SBC Missouri's advantage.

The Commission will order SBC Missouri, until Complainants' and intervenors' interconnection agreements have been amended, to comply with the FCC's TRRO. Specifically, it will order SBC to continue accepting and processing new orders, moves, adds, and changes to the Coalition members' and the intervenors' existing embedded customer base under the rates, terms and conditions of their respective M2A or M2A-derived Agreements. This requirement applies to orders, moves, adds, and changes for existing customers only, not to new customers. It

¹ Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338 (FCC Feb. 4, 2005). ("TRRO"), *petition for review pending*, *USTA v. FCC*, No. 05-1058 (D.C. Cir.).

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applies to existing customers at existing or new locations. For purposes of this order, a customer is defined as an entity that receives a bill from a CLEC. For example, if a person is sole shareholder of a corporation, and that corporation receives the bill from the CLEC, any new corporation formed by that person would not be an existing customer and SBC Missouri would not be required to process an order for UNEs to serve the new corporation. However, if the original corporation opened a new facility, and the CLEC ordered new UNEs to serve that new facility, SBC Missouri would be required to process that order.

The Commission will also order SBC Missouri, pursuant to Paragraph 234 of the TRRO, to process requests for UNEs when the requesting carrier has self-certified. However, the self-certification must be made in good faith and must clearly set forth the **reasons** why the requesting carrier believes its request is consistent with the requirements set out in parts IV, V, and VI of the TRRO. A mere statement that the requesting carrier believes it is entitled to unbundled access to a particular network element is not sufficient. Nor is a simple recitation of the documents that the requesting carrier has reviewed. The requesting carrier must: A) describe its diligent inquiry; and B) explain how that inquiry leads it to believe that it is entitled to unbundled access to a particular network element. If a requesting carrier does not fulfill these two requirements, SBC Missouri is not obligated to process the request. But if a requesting carrier does fulfill them, SBC Missouri has no discretion to reject a request. If SBC Missouri believes it has been required to process a request that should not have been processed, it may bring that dispute to the Commission, but it must first process the request.

The Commission takes this extraordinary action because the harm to property alleged by the CLECs is serious, and because the actions SBC Missouri has outlined in its accessible letters is contrary to the terms of the TRRO. Without this action by the Commission, SBC Missouri would violate the terms of the TRRO to the detriment of the public interest. The Commission rejects the arguments of the CLEC Coalition that the change-of-law provisions in their interconnection agreements prohibit any changes to the terms of those agreements. It is clear from the TRRO that the FCC intended that its provisions go into effect immediately. To accept the CLECs' argument about the change-of-law provisions, one must read the TRRO as allowing CLECs to add new customers under the UNE-P regime for another year. This reading is beyond question contrary to the FCC's intent. The FCC intended for UNEs to be available to CLECs only to the extent that CLECs' ability to continue to provide service to existing customers not be threatened. This order prevents SBC Missouri from thwarting that intent, and it prevents the CLECs from expanding it.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone, L.P. dba SBC Missouri, until new interconnection agreements are effective or until otherwise ordered by this Commission, shall continue accepting and processing new orders, moves, adds, and changes to the Coalition members' and intervenors' existing embedded customer base, under the rates, terms and conditions of their respective M2A or M2A-derived Agreements.

2. That Southwestern Bell Telephone, L.P. dba SBC Missouri, until new interconnection agreements are effective or until otherwise ordered by this Commission, shall process requests for UNEs when the requesting carrier has self-certified as described in this order.

3. That a hearing in this case shall be held on March 30, 2005, beginning at 8:30 a.m. The hearing shall be held at the Commission's office in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, a building that meets accessibility standards of the Americans with Disabilities Act. Any person who needs specific accessibility accommodations may call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or Relay Missouri at 711 prior to the hearing.

4. That this order shall become effective on March 17, 2005.

Gaw, Clayton and Appling, CC., concur

Davis, Ch., and Murray, C., dissent

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of an Investigation into Various Issues Related to
the Missouri Universal Service Fund.***

*Case No. TO-98-329
Decided March 17, 2005*

Telecommunications §2. The Commission ruled that telecommunication carriers shall pay assessments of 1.8 percent times the previous month's net jurisdictional revenue, to the Missouri Universal Service Fund administrator on the 22nd day of each month. The requests for reimbursements shall be made no later than the 15th day of each month and reimbursements shall be dispatched no later than the last day of each month. Affected carriers may recover their assessments through a surcharge. The provisions of 4 CSR 240-31.050(3)(D) are waived for Missouri customers who receive federal Lifeline support.

Telecommunications §14.1. The Commission ruled that telecommunication carriers shall pay assessments of 1.8 percent times the previous month's net jurisdictional revenue, to the Missouri Universal Service Fund administrator on the 22nd day of each month. The requests for reimbursements shall be made no later than the 15th day of each month and reimbursements shall be dispatched no later than the last day of each month. Affected carriers may recover their assessments through a surcharge. The provisions of 4 CSR 240-31.050(3)(D) are waived for Missouri customers who receive federal Lifeline support.

Rates §81. The Commission ruled that telecommunication carriers shall pay assessments of 1.8 percent times the previous month's net jurisdictional revenue, to the Missouri Universal Service Fund administrator on the 22nd day of each month. The requests for reimbursements shall be made no later than the 15th day of each month and reimbursements shall be dispatched no later than the last day of each month. Affected carriers may recover their assessments through a surcharge. The provisions of 4 CSR 240-31.050(3)(D) are waived for Missouri customers who receive federal Lifeline support.

ORDER GRANTING STAFF MOTION

On February 16, 2005, the Staff of the Commission filed a motion asking that the Commission direct the Missouri Universal Service Fund Administrator to begin assessing carriers on June 22, 2005. Staff stated that, pursuant to previous Commission orders, funding for the Low-Income/Disabled portion of the Missouri Universal Service Fund is to be accomplished through assessments on telecommunications carriers. Staff noted that the necessary rule changes have been made, and the Fund Administrator has been selected. In addition to directing the Fund Administrator to begin assessments, Staff asks that notice be provided to all affected carriers that they may begin recovering their assessments through a surcharge beginning on May 1, 2005.

Staff asks that the Commission authorize the Missouri Universal Service Fund administrator to begin assessing telecommunications companies at the assessment percentage recommended and approved by the Missouri Universal Service Fund Board (1.8 percent).

* See page 225, Volume 11 MPSC 3d for another order in this case.

Staff also asks that the Commission waive the requirements of 4 CSR 240-31.050(3)(D) for customers that already receive federal Lifeline support. This rule requires customers to certify, on a form designated for that purpose, that they qualify for support. Requiring customers that have already qualified for federal support to submit this form is unnecessary, since by receiving federal support, they have met a criteria for receiving Missouri Universal Service Fund Support. The Commission agrees, and will waive this rule for Missouri customers receiving federal Lifeline support.

The Commission's rules allow ten days for a party to respond to a pleading. Although no party timely responded, on February 28, 2005, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri filed a pleading opposing Staff's motion. SBC Missouri states that Staff's motion is "incomplete in that it does not discuss either the timing of discounts available to eligible low-income and disabled customers nor the timing of reimbursements to carriers that afford their customers such discounts." SBC Missouri asks the Commission to deny Staff's motion until these items are addressed.

On March 3, 2005, the Small Telephone Company Group¹ filed a pleading concurring with SBC Missouri.

On March 4, 2005, Staff filed a response to SBC Missouri. Staff opines that the items noted by SBC Missouri should be established by the fund administrator rather than by the Commission. Staff states:

the Fund Administrator has agreed to furnish the Staff with a schedule of dates for discounts and reimbursements, and a recommended procedure for reimbursements, as requested by SBC. In recent discussions the Fund Administrator indicated that such information could be provided to the MoUSF Board and the Staff no later than noon on Wednesday, March 9, 2005. The Staff will submit these explanations by filing them in this case as soon as they are available to the Staff.

On March 16, 2005, Staff filed the information provided by the fund administrator. The fund administrator proposes that carriers should begin to provide discounts effective June 1, 2005, and that carriers could seek reimbursements from the fund administrator by July 15, 2005, and that the fund administrator would make disbursements no later than the last business day of July.

¹BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Spectra Communications Group, Inc., and Steelville Telephone Exchange, Inc.

On March 16, 2005, SBC Missouri filed a response to the Staff filing of the information from the fund administrator earlier that day. SBC Missouri concurs with the proposed procedures of the fund administrator, and points out that the fund administrator only addressed the first month of disbursements. SBC Missouri suggests that requests for disbursements should be made by the 15th day of each month, and disbursements be dispatched by the last day of each month. The Commission agrees that this is reasonable.

Staff's request is a necessary step in implementing with the Low-Income/ Disabled portion of the Missouri Universal Service Fund. The additional responses filings by SBC Missouri and the fund administrator provide additional dates not addressed in Staff's motion. The Commission will grant Staff's motion, as qualified by its March 16, 2005 filing and the March 16, 2005 response of SBC Missouri. The Commission will direct Staff to file a copy of the notice it proposes be sent to Missouri telecommunications companies.

IT IS THEREFORE ORDERED:

1. That the Missouri Universal Service Fund administrator shall begin assessing carriers, with the first assessment due on June 22, 2005; the assessment shall be 1.8 percent times the previous month's net jurisdictional revenue.
2. That all applicable carriers as defined by 4 CSR 240-31.010(1) shall pay their assessments to the Missouri Universal Service Fund administrator on the 22nd day of each month.
3. That requests for reimbursement shall be made no later than the 15th day of each month, and reimbursements shall be dispatched no later than the last day of each month.
4. That the Staff of the Commission shall, no later than March 18, 2005, provide to the Data Center a copy of the notice to be sent to affected carriers.
5. That the Data Center of the Commission shall, no later than March 22, 2005, send notice to all certificated telecommunications companies, except payphone providers and shared tenant services providers, advising them that they may begin billing their customers the Missouri Universal Service Fund surcharge on May 1, 2005, if applicable.
6. That the provisions of 4 CSR 240-31.050(3)(D) are waived for Missouri customers who receive federal Lifeline support.
7. That this order shall become effective on March 27, 2005.

Davis, Ch., Murray, Clayton and Appling, CC., concur
Gaw, C., dissents

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of an Investigation into the Tree Trimming Policies
of Union Electric Company d/b/a AmerenUE.**

*Case No. EW-2004-0583
Decided March 31, 2005*

Electric §33. The Commission ordered that AmerenUE must report its tree-trimming progress to the Commission.

Electric §39. AmerenUE will increase its annual tree-trimming budget from \$23.5 million to \$30 million.

Electric §42. AmerenUE plans to eliminate its tree-trimming backlog by December 31, 2008. Also, to avoid problems it had in the past, AmerenUE will turn off its algorithm system when outage reports in the metro area reach 1,000, or when orders in a region outside the metro area reach 250.

**ORDER REGARDING UNION ELECTRIC COMPANY'S
TREE-TRIMMING POLICIES AND CLOSING CASE**

Syllabus: This order requires Union Electric Company d/b/a AmerenUE to report to the Staff of the Commission concerning its tree-trimming policies, and closes the case.

On May 13, 2004, the Commission opened this case for its Staff to investigate the tree-trimming policies of Union Electric Company d/b/a AmerenUE. The Commission opened this case as a spin-off from a complaint case.¹ The Commission ordered Staff to file its report no later than August 11.

August 11 Staff Report

On August 11, Staff filed a report. In that report, Staff stated that AmerenUE customers in the St. Louis area lost power during a series of storms on July 5 and 6. Staff further stated that the Commission directed Staff to report on those storm outages and AmerenUE's restoration of service.

Staff's report contained an overview of AmerenUE's vegetation management policy and practices. Staff stated that AmerenUE prunes vegetation as recommended by the International Society of Arboriculture. AmerenUE also uses herbicides, as allowed by AmerenUE's Environmental Safety and Health Department, Manager of Vegetation, and easement and government restrictions.

To manage vegetation, AmerenUE employs contractors, and randomly audits 10 to 30 percent of the assigned projects. AmerenUE also uses the National Electrical Safety Code as its minimum safety standards. AmerenUE's pruning practices vary according to the voltage of the line to be protected. The higher the line's voltage, the more often AmerenUE patrols the line. Finally, AmerenUE also has customer brochures available that suggest vegetation types and planting locations that would benefit both AmerenUE and landowners.

¹ Commission Case No. EC-2004-0254.

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November 30 Staff Report

On November 30, Staff filed another report. That report included Staff's August 31 report on AmerenUE's response to the storms.

The July 5 storms affected over 250,000 AmerenUE customers. Peak winds were measured at about 92 m.p.h. AmerenUE facilities in the St. Louis area are designed to withstand 70 m.p.h. winds, which is what local building codes require. Much of the damage to AmerenUE's distribution system was due to downed trees and limbs. AmerenUE immediately sent crews out following the first band of storms, and also had contract help working by the next day.

Despite AmerenUE's following its emergency plan, AmerenUE did not accurately inform its customers about when it would restore service. Customers could not talk to a person, but instead received a recording. That recording underestimated the time it would take for AmerenUE to restore service. AmerenUE also used an automated calling service to ask customers if their power was on. Some customers misunderstood the message, and thought that the message told them that their power was on, when, in fact, it was not.

Staff listed five recommendations concerning AmerenUE's storm response. The recommendations are:

- 1) That AmerenUE should immediately address its backlog of tree-trimming its distribution systems;
- 2) That AmerenUE should review its mutual assistance agreement to ensure that it allows AmerenUE to use all outside crews that are actually available;
- 3) That AmerenUE should review the algorithm it uses to estimate restoration times for customers, and either should incorporate large outages such as the July 5 storm into the algorithm, or should develop an alternative way to estimate restoration times after massive storms;
- 4) That AmerenUE should review and improve its automated message that informs customers when they should expect their service to be restored;
- 5) That AmerenUE should inform its medical equipment registry customers that they may have lengthy outages during massive storms, and that those customers are not ensured priority in getting back online.

Included with the Staff report was a November 2 letter to Staff from Ronald Zdellar, AmerenUE's Vice President of Energy Delivery. That letter listed the steps that AmerenUE had taken to address Staff's five recommendations. AmerenUE's responses to the recommendations are:

- 1) The limited availability of properly trained tree-trimmers makes eliminating the backlog virtually impossible. But AmerenUE will increase its tree-trimming budget from \$23.5 million in 2004 to \$30 million in 2005. AmerenUE will require annual tree-trimming budgets of approximately \$30 million to eliminate the tree-trimming backlog by December 31,

2008. AmerenUE agrees to give Staff reports on tree-trimming schedules, staffing and funding on January 15, 2005 and July 30, 2005, and thereafter every January 15. AmerenUE is also willing to participate in joint field reviews of the program.

2) AmerenUE has reviewed its mutual assistance agreements, and has confirmed that reasons other than actual crew availability are not resulting in a reduction of outside crew availability. The other parties in those agreements decide when outside crew is available.

3) AmerenUE agrees that its algorithm used to estimate restoration times becomes inaccurate when applied to a large outage. AmerenUE plans to turn off the algorithm system when orders in the metro area reach 1,000, or when orders in a region outside the metro area reach 250.

4) AmerenUE has changed its customer callback message.

5) AmerenUE has changed its medical equipment registry enrollment letters.

March 7 Status Report

On March 7, 2005, Staff filed another report. That report referenced a February 1 meeting between AmerenUE and Staff. After that meeting, AmerenUE and Staff agreed that AmerenUE would supply Staff the following:

1) AmerenUE Reports on Metro Tree-Trimming Schedule and Other Area Tree Trimming Schedule – approximately 45 days after the end of each calendar quarter – hard copy and electronic copy;

2) AmerenUE Reports on Missouri Vegetation Management O&M Budget, Missouri Overhead System Feeder Master File, Budget Dollar Amounts for Transmission & Distribution for the Next Year, and Actual Dollar Amounts for Transmission & Distribution for the Previous Year – approximately February 15 of each year – hard copy and electronic copy;

3) “High Level” Four Year Schedule of AmerenUE Vegetation Management Plan; and

4) Staff being invited to participate in field reviews – biannually, initially around May 15 and November 15 of each year.

AmerenUE did not respond to Staff's March 7 report.

The Commission finds that AmerenUE and Staff have appropriately addressed the Commission's concerns regarding AmerenUE's tree-trimming policies and vegetation management. The Commission will order AmerenUE to abide by the agreement described in Staff's March 7 Status Report, and will close the case.

IT IS THEREFORE ORDERED:

1. That Union Electric Company d/b/a AmerenUE shall file Reports on Metro Tree-Trimming Schedule and Other Area Tree Trimming Schedule – approximately 45 days after the end of each calendar quarter – hard copy and electronic copy.

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2. That Union Electric Company d/b/a AmerenUE shall file Reports on Missouri Vegetation Management O&M Budget, Missouri Overhead System Feeder Master File, Budget Dollar Amounts For Transmission & Distribution for the Next Year, and Actual Dollar Amounts for Transmission & Distribution for the Previous Year – approximately February 15 of each year – hard copy and electronic copy.

3. That Union Electric Company d/b/a AmerenUE shall file its “High Level” Four Year Schedule of AmerenUE Vegetation Management Plan.

4. That Union Electric Company d/b/a AmerenUE shall invite the Staff of the Commission to participate in field reviews – biannually, initially around May 15 and November 15 of each year.

5. That this order shall become effective on April 10, 2005.

6. That this case shall be closed on April 11, 2005.

Davis, Ch., Murray, Gaw, Clayton and Appling, CC., concur

Pridgin, Regulatory Law Judge

In the Matter of Laclede Gas Company's Purchased Gas Adjustment Tariff Revisions to be Reviewed in Its 2000-2001 Actual Cost Adjustment.*

Case Nos. GR-2001-387 & GR-2000-622

Decided April 7, 2005

Gas §19. Following explicit direction from the Missouri Court of Appeals following an appeal, the Commission reversed its previous order and allowed Laclede Gas Company to retain \$4,872,997 in proceeds from its Price Stabilization Program account for the winter of 2000-2001.

ORDER ON REMAND

On April 29, 2003, the Commission issued a report and order regarding Laclede Gas Company's actual cost adjustments for 1999-2000 and 2000-2001. As part of that order, the Commission required Laclede to flow back to its customers \$4,872,997 in proceeds that were not previously distributed by Laclede from its Price Stabilization Program account for the winter of 2000-2001. Laclede appealed that aspect of the Commission's order. On March 1, 2005, the Missouri Court of Appeals for the Western District issued a decision that reversed the Commission's order.¹

The Court of Appeals found that the plain language of Laclede's tariff entitled Laclede to retain the disputed proceeds, and remanded the case to the Circuit Court of Cole County, with directions to remand the cause to this Commission for further proceedings consistent with its opinion. The Circuit Court remanded the cause to the Commission in an order issued March 30, 2005.

The Court of Appeals' order does not allow the Commission any discretion and the Commission must now simply issue its order consistent with that decision.

IT IS THEREFORE ORDERED:

1. That the Commission's previous order requiring Laclede Gas Company to flow back to its customers \$4,872,997 in proceeds that were not previously distributed from the Price Stabilization Program account from the winter of 2000-2001 is reversed, and Laclede may retain those proceeds.
 2. That Laclede Gas Company shall adjust its account balances in this and subsequent ACA filings in a manner consistent with this order.
 3. That this order shall become effective on April 17, 2005.
- Davis, Ch., Murray, Gaw, Clayton and Appling, CC., concur

Woodruff, Senior Regulatory Law Judge

* See page 554, Volume 9 MPSC 3d and page 98, Volume 10 MPSC 3d for other orders in this case.

¹ *State ex rel Laclede Gas Co. v. Public Serv. Comm'n*, 205 Mo. App. Lexis 343 (Mo. App. W.D. 2005).

**In the Matter of the County of Jackson, Missouri, Complainant,
v. Trigen-Kansas City Energy Corp., and Thermal North
America, Inc. Respondents.***

*Case No. HC-2005-0331
Decided April 7, 2005*

Service §4. Steam §24. Section 386.310.1 RSMo gives the Commission authority to order a utility to take appropriate and necessary actions to maintain the safety and reliability of its distribution system.

Service §§ 2, 4. Steam §24. The evidence presented at an expedited hearing showed that while the reliability of the steam service offered by the utility would be slightly reduced by the conversion from a looped system to separate radial lines, there was no indication that its services would be rendered unsafe, unreliable, or inadequate, such as to justify an emergency order that would disrupt a major civic construction project.

APPEARANCES

Jeremiah Finnegan, Attorney at Law, Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209 Penntower Office Center, Kansas City, Missouri 64111, for the County of Jackson, Missouri.

Paul DeFord, Attorney at Law, Lathrop & Gage, 2345 Grand Blvd., Kansas City, Missouri 64108, for Trigen-Kansas City Energy Corp.

Mark Comley, Attorney at Law, Newman, Comley & Ruth, 601 Monroe, Suite 301, P.O. Box 537, Jefferson City, Missouri 65102, for the City of Kansas City, Missouri.

Steven Dottheim, Chief Deputy General Counsel, and *Robert Franson*, Senior Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Morris L. Woodruff**

**REPORT AND ORDER
DENYING INTERIM RELIEF**

SUMMARY

Following an expedited hearing, the Commission denies Jackson County's request for continuation of an interim order preventing Trigen-Kansas City Energy Corp. from cutting its steam distribution loop to comply with an order from the City of Kansas City to vacate its right-of-way through the construction site for Kansas City's downtown arena. The Commission will, however, allow Jackson County's complaint to proceed on other issues and directs Trigen to file an answer to that complaint.

* On August 4, 2005, the County of Jackson filed a pleading purporting to dismiss, without prejudice, the complaint it had filed against Trigen-Kansas City Energy Corp. and Thermal North America, Inc. On August 17, 2005, the Commission issued an order granting Jackson County leave to dismiss its complaint.

Pending Motions and Other Matters

At the hearing, Kansas City requested leave to late-file several documents that it had not been able to prepare for submission at the hearing. Exhibit 9 was reserved for certified copies of relevant portions of Kansas City's City Charter. Exhibit 12 was reserved for submission of correspondence between Trigen and Kansas City regarding payment of the costs associated with the removal of Trigen's steam lines from the site of the arena project. The presiding officer directed Kansas City to submit the late-filed exhibits no later than April 5, and ordered that any party objecting to the admission to those documents raise those objections no later than Noon on April 6.

On April 5, Kansas City filed a copy of the portions of Kansas City's charter that it wished to bring to the attention of the Commission, along with a request that the Commission take official notice of those provisions. At the same time, Kansas City submitted a copy of a January 18, 2005 letter from Trigen to Kansas City, which will be designated as Exhibit 12, and a February 3, 2005 letter from Kansas City to Trigen, which will be designated as Exhibit 13. No party raised any objection to either the admission of the letters into evidence, or the Commission's taking official notice of the provisions of Kansas City's charter. Therefore, the Commission will take official notice of the cited provisions of Kansas City's charter. Furthermore, Exhibits 12 and 13 will be admitted into evidence.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On March 29, 2005, the County of Jackson, Missouri, filed a complaint against Trigen-Kansas City Energy Corp., and against Thermal North America, Inc., the prospective corporate parent of Trigen. Trigen is a public utility operating a regulated steam service in downtown Kansas City. Jackson County is a major customer of that service.

Jackson County's complaint alleged that Trigen has informed its customers that the City of Kansas City has passed an ordinance that will require Trigen to permanently remove that portion of its steam network that lies in the area of planned construction for a downtown arena. Jackson County and Trigen's other customers will still be able to receive steam service from Trigen after the steam line is cut, but the system will no longer be a loop. Instead, Trigen's customers will be served by only one of two radial connections to Trigen's steam plant until Trigen reconstructs its loop, a process that Trigen indicated will take a year or more.

Using the current looped system, Trigen's customers are able to receive steam from two directions. That means that if there is an interruption on one side of the loop, downstream customers can still receive steam from the other side of the loop. If the loop is cut, that redundancy will be lost. Jackson County's complaint alleged that if that happens, Trigen will no longer be providing safe, reliable, and adequate service as required by law.

Jackson County's complaint alleged that Trigen originally informed its customers that it would be cutting the steam loop on March 5. After Jackson County and other steam customers had talks with Trigen and Kansas City, Trigen agreed to postpone the cutting of the loop until April 2. Jackson County alleges that on March 28 it was informed that no further negotiations or delays would be allowed and that the steam loop would be cut on April 2. Jackson County asked the Commission to issue an immediate order setting a hearing on its complaint and directing Trigen to "cease and desist from severing its steam main pending final adjudication of this complaint."

On March 30, the City of Kansas City filed an application to intervene and a motion to dismiss Jackson County's complaint. Kansas City contended that the Commission lacks authority to order Trigen to disobey a valid order of the city regulating the use of the city's right-of-way. According to Kansas City, the relief sought by Jackson County would create delays in a major public works project and interfere with the duly enacted and authorized police powers of the city and its authority to enforce the terms of its utility franchises.

On March 31, the Commission issued an order that directed Trigen not to sever its steam loop on April 2, or thereafter, pending further order of the Commission. That order also granted Kansas City's application to intervene and scheduled a hearing for April 4.

A hearing was held on April 4, and evidence was presented. Jackson County, Trigen, Kansas City, and the Staff of the Commission appeared and participated in the hearing. The Office of the Public Counsel did not appear. The parties filed written post-hearing arguments on April 6.

The Service Provided by Trigen

Trigen currently provides steam service to approximately 60 customers in the downtown area of Kansas City.¹ Trigen generates the steam at a generation plant, the Grand Avenue Station, located north of downtown near the Missouri River. The steam is then transported through two 14-inch mains that leave the plant together but then diverge, one traveling up Wyandotte Street and the other up McGee Street. The two mains ultimately rejoin on 14th Street, thus forming a loop. Customers throughout downtown are served off this loop, as well as from radial lines emanating from the loop. The steam that travels through this loop is used by customers primarily for heat during the winter. However, some steam is used during the summer and the steam system remains in operation throughout the year.²

¹ Transcript, page 34, lines 8-9.

² Transcript, page 30, lines 14-16.

Jackson County's Use of Steam

Jackson County is one of the largest customers for the steam produced and distributed by Trigen. Jackson County owns and operates several buildings in Kansas City that are served by Trigen's steam system. The two largest are the county's Kansas City courthouse, and the county detention center. The courthouse primarily uses steam as a heating source during the winter months.³ The county detention center uses steam heat during the winter, but also relies on steam to cook meals, wash dishes, operate its laundry facilities, and heat water.⁴ Neither building has its own boilers to provide steam if its supply of steam from Trigen is cut off.⁵ As a result, an extended loss of that steam supply could have dire consequences.

The consequences would be particularly severe if the steam supply were lost for the detention facility. That facility is the county's maximum security jail and holds up to 800 prisoners. Those prisoners must be fed and kept clean and warm and that cannot be done without a supply of steam. If that supply of steam were cut off for an extended period, the prisoners might have to be evacuated, and the county has no other facility capable of housing them.⁶

Cutting the Loop

Understandably, Jackson County is very concerned about the reliability of its supply of steam. In its current configuration, Jackson County receives its steam through a looped system. That means that if, for any reason one leg of the loop was blocked, Jackson County could still receive steam through the other leg of the loop.⁷ Thus the system has a built-in redundancy. That redundancy is, however, about to end.

The City of Kansas City, in a partnership with a private developer, is building a new Downtown Arena.⁸ The site of the new arena will displace the city streets under which a portion of Trigen's steam loop now runs. In fact, if the city were able to magically build the arena without moving the steam line, the steam line would run through center court approximately 15 feet above the basketball floor.⁹ Obviously, the steam line must be moved if the arena is to be built.

On October 19, 2004, the City of Kansas City sent a letter to Trigen informing it that the city would be vacating the right-of-way of the streets and alleys through the construction area. Trigen was directed to remove its steam line from the affected area by March 1, 2005. In the same letter, Trigen was informed that the cost of removing and relocating the line was Trigen's responsibility and that its costs would not be reimbursed by the city.¹⁰

³ Transcript, page 90.

⁴ Transcript, page 142, Lines 8-14.

⁵ Transcript, page 91, lines 20-22.

⁶ Transcript, page 145.

⁷ Transcript, page 29, 10-15.

⁸ Transcript, pages 156-159.

⁹ Transcript, page 165, lines 1-12.

¹⁰ Exhibit 4.

On February 22, 2005, Trigen sent a letter to its customers, including Jackson County, indicating that it would be cutting and capping the steam loop at either end of the construction area. The portion of the line between the caps would then be removed to make way for the arena. The letter also indicates that once the line is cut at the construction site, the steam system will no longer operate as a loop. Instead, steam will be distributed to Trigen's customers on two separate radial connections. Trigen indicated that it was its "intention" to restore the loop by reconnecting the terminals once a new routing path is determined, but that such reconnection might not happen for one or more years.¹¹

The February 22 letter indicated that the loop would be cut, with a resulting short service outage, on Saturday, March 5. Subsequently, Trigen delayed the cut date until April 2, to avoid having an outage during the heating season.¹² In an effort to avoid having the loop cut on April 2, Jackson County filed its complaint with this Commission on March 29, alleging that its property and the health of its citizens would face the likelihood of imminent threat of serious harm to life or property if the loop were cut as scheduled. Faced with those serious allegations, the Commission issued an order on March 31, ordering Trigen not to cut the loop, and scheduling a hearing for April 4.

The Reliability of Trigen's Steam System with and without the Loop

Jackson County's complaint is based on the assertion that without the loop, Trigen's steam distribution system will become unreliable, resulting in harm to Trigen's customers. Common sense indicates that a system that delivers steam over only one radial line will be somewhat less reliable than a system that uses a loop design to allow for steam to be delivered to a customer from more than one direction. Obviously, there is a greater risk of an outage if there is only one pathway for the delivery of steam. However, an undetermined reduction in reliability of the system does not constitute proof that Trigen's customers are facing a "likelihood of imminent threat of serious harm to life or property" if the loop is cut.

The only testimony that Jackson County offered regarding the amount by which the reliability of the steam distribution system might be reduced came from Brian Kirk, general manager for Trigen's steam and chilled water systems in Kansas City. Kirk is an engineer and has worked in the utility and district energy industry for the past 18 years.¹³ Kirk acknowledged that the reliability of a radial distribution system would be somewhat less than the reliability of a looped system.¹⁴ For that reason, he indicated that the system worked best as a loop and that he thought Trigen would want to reconnect it in the future.¹⁵

However, when asked to quantify the amount by which the reliability of the system might be reduced by a change from a loop to a radial system, Kirk testified that Trigen currently operates radial steam systems in Trenton, New Jersey,

¹¹ Exhibit 6.

¹² Transcript, page 41, lines 17-24.

¹³ Transcript, page 23, lines 15-18.

¹⁴ Transcript, page 35, lines 7-8.

¹⁵ Transcript, page 46, lines 17-19.

Oklahoma City and Tulsa, Oklahoma.¹⁶ He further testified that the Tulsa radial system was a highly reliable system, currently operating at a reliability rate of 99.8 percent. He also testified that Kansas City's current looped steam system was operating with a reliability rate of 99.98 percent. He expected that if Kansas City's looped system became a radial system it would operate at a reliability rate comparable to that of the Tulsa system and that he would not expect it to drop to a reliability rate of less than 99.5 percent.¹⁷ He also testified that the conversion to a radial system would not require greater maintenance on the line, would not increase the risk of rupture on the line, and would not require more service interruptions.¹⁸ Finally, Kirk testified that even if the radial line should fail, there are alternative means for supplying steam to Trigen's customers. Specifically, Kirk testified that portable, truck mounted boilers could be rented to restore steam within 8 to 24 hours after the disruption of the steam supply.¹⁹

Kirk's conclusion that Trigen's system would retain a high degree of reliability after the conversion to a radial system was supported by the only other witness to offer expert testimony on the reliability of the system. Warren Wood, energy department manager for the Commission's Staff and a professional engineer in Missouri and Kansas,²⁰ concluded that while the radial system would be somewhat less reliable than the existing loop system, there was no indication that it would become unsafe or inadequate when converted to a radial system.²¹

The other witnesses presented by Jackson County did not attempt to challenge Kirk's assessment of the effect on reliability resulting from the cutting of the loop.²² Even if they had wished to make such a challenge, they clearly lacked the expertise in the design and management of a steam distribution system that would be required to make such an assessment. They were only able to testify that the steam system was vital to the county and that bad things would happen if the county were to lose its supply of steam. However, the only assessment of reliability that they were able to offer was to confirm that the steam service offered by Trigen has been reliable in the past.²³

The testimony offered by Kirk and Wood regarding the reliability of a radial system was credible and will be accepted as the only available indication of the amount by which the reliability of Trigen's distribution system would be affected by the cutting of the loop.

¹⁶ Transcript, page 38, lines 9-10.

¹⁷ Transcript, pages 69-70.

¹⁸ Transcript, pages 67-68.

¹⁹ Transcript, page 86, lines 8-14.

²⁰ Transcript, page 188.

²¹ Transcript, page 190, lines 12-21.

²² Jackson County's other witnesses were Bruce Palmer, Director of Facilities Management for Jackson County; Katherine Shields, Jackson County Executive; and Graham Morris, Jackson County's Director of the Department of Corrections.

²³ Transcript, page 103.

The Construction Schedule for the Arena

Kansas City plans to complete the arena project by the fall of 2007. To meet that goal, it must maintain a tight construction schedule. Any delay could potentially be very costly, especially if the city is otherwise able to attract an NBA or NHL franchise for the 2007 season.²⁴ Thus far the Commission's order to delay the cutting of the loop has not caused any delay for the overall project.²⁵ But, in order to stay on schedule, Kansas City needs to have Trigen's pipeline removed beginning no later than April 26. That means that Trigen would need to cut the loop no later than Saturday, April 23.²⁶

If Trigen chooses to recreate the loop by laying new pipe through the grounds of the arena, which may be a less expensive alternative, it would not be able to do so until the fall of 2006 because of the ongoing construction of the arena.²⁷ If Trigen chooses to relocate the loop using the street right-of-way around the perimeter of the arena construction area, it could begin work sooner and could likely complete the relocation project and restore the loop by the fall of 2005.²⁸

Aside from its request that the Commission order Trigen not to cut the loop at all, Jackson County's complaint also expresses concern that Trigen may choose not to recreate the loop, thus making the diminishment of the system's reliability permanent. There are some facts that would indicate that Jackson County has good reason to be concerned.

The first cause for concern is the uncertainty surrounding the ownership of Trigen. At the moment, Trigen is owned by the Suez – Tractebel Corporation. However, this Commission has approved the sale of Trigen to Thermal North America, Inc., the other named respondent. The sale is awaiting regulatory approval in another state and it may be ready to close in the very near future.²⁹ With the change in ownership, any assurances by the current ownership that the loop will be recreated could become meaningless.

The second cause for concern is the high cost associated with recreating the loop. Brian Kirk testified that he estimated the cost of relocating and recreating the loop would be approximately \$750,000 - \$800,000.³⁰ Although Staff and Jackson County argue that the City of Kansas City should be required to reimburse Trigen for all or part of that expense, Kansas City has made it quite clear that it believes that it is not required to pay any such costs and that it does not intend to offer any reimbursement to Trigen. Trigen is a relatively small company and an expense of \$800,000 is a large percentage of the company's annual income. Therefore, it would not be surprising if Trigen strongly considered the possibility of choosing not to recreate the loop.

²⁴ Transcript, page 176.

²⁵ Transcript, page 176, lines 1-5.

²⁶ Transcript, page 171.

²⁷ Transcript, page 169, lines 3-6.

²⁸ Transcript, page 184, lines 10-25.

²⁹ Transcript, page 222, lines 11-21.

³⁰ Transcript, page 33, lines 6-10.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Trigen-Kansas City Energy Corp. is a "Heating Company" and a "Public Utility," as those terms are defined at Section 386.020 (20) and (42), RSMo 2000. As such it is subject to regulation by this Commission.

Section 393.130.1, RSMo 2000, provides that:

Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. ...

Pursuant to Section 393.290, RSMo 2000, the powers of the Commission to regulate other utilities as provided in chapters 386, 392 and 393 are made applicable to Trigen, as a heating company,

Jackson County is authorized to bring a complaint against Trigen by terms of Section 386.390, RSMo 2000.

Section 386.310.1, RSMo, provides as follows:

The Commission shall have power, after a hearing had upon its own motion or upon complaint, ... to require every person, corporation, municipal gas system and public utility to maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, customers or the public may demand, ...

This section gives the Commission the authority to order Trigen to take appropriate and necessary actions needed to maintain the safety and reliability of its steam distribution system.

Section 386.310.1, RSMo 2000, further provides as follows:

The commission may waive the requirement for notice and hearing and provide for expedited issuance of an order in any case in which commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property, provided that the commission shall include in such an order an opportunity for hearing as soon as practicable after the issuance of such order.

On the basis of this statutory provision, the Commission issued its March 31 order directing Trigen not to sever its steam loop until further order of the Commission.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

Jackson County's March 29 complaint alleged that Trigen's intention to cut its steam loop on April 2 would endanger the public and that there would be no practical means for remedying the danger once the loop was cut. Based on that representation, the Commission issued an order on March 31 directing Trigen not to cut the loop on April 2, or thereafter, pending further order of this Commission. In order to quickly review its rather extraordinary order, the Commission scheduled an expedited hearing for April 4, only six days after Jackson County filed its complaint, and before Trigen even had an opportunity to file an answer to that complaint. The only issue from that expedited hearing that the Commission needs to address at this time is whether to continue its order preventing Trigen from cutting its loop.

It is abundantly clear that Trigen must act to cut and cap its steam distribution line, and thereby sever the loop, if Kansas City's downtown arena project is to go forward without delay. In fact, Trigen must take that action no later than April 23 if delay is to be avoided. No one, including Jackson County, wants to be responsible for causing that civic project to fail. It is also clear that Jackson County has not presented any evidence to suggest that the public will suffer any imminent threat of serious harm to life or property if the loop is cut. On the contrary, the evidence shows that while the reliability of the steam service offered by Trigen would be slightly reduced, there is no indication that its service would be rendered unsafe, unreliable, or inadequate after the loop is cut and the company begins providing services over two radial lines.

The Commission's March 31 order required Trigen to defy an apparently lawful order from the City of Kansas City to vacate the right-of-way granted to it by the city. Based on the evidence presented to the Commission on April 4, there is no reason to continue that order in effect.

Even if the order preventing Trigen from cutting the loop is lifted, Jackson County continues to request that Trigen be ordered to restore the loop by relocating the line before the beginning of next winter's heating season. That request will not be granted in this order because, again, Jackson County was not able to establish the need for such an expedited, interim order. The decision of whether to relocate the line, and the best manner for doing so, is a decision that will have a tremendous financial impact on Trigen and its customers and should not be made based on the limited record established at an expedited hearing.

This report and order does not, however, finally resolve Jackson County's complaint against Trigen. The question of whether, and in what manner, the distribution loop is to be restored is still very much alive. Jackson County was not able to demonstrate the need for an extraordinary remedy that would disrupt a major civic construction project at this expedited hearing. However, given a reasonable opportunity to prepare its case and to seek testimony from additional experts, it may be able to present evidence to show the need for the restoration of the distribution loop. Furthermore, the question of who is to pay for the cost of relocation and

restoring the loop is also raised in Jackson County's complaint. That issue is not relevant to this expedited hearing and thus has not yet been addressed. However, that question can be further explored in future proceedings.

Trigen will be ordered to file an answer to Jackson County's complaint, and the Commission will proceed to consider the other elements of that complaint expeditiously.

IT IS THEREFORE ORDERED:

1. That the Commission's March 31 order directing Trigen-Kansas City Energy Corp. and Thermal North America, Inc., not to cut their steam main loop on April 2, 2005, or thereafter, pending further order of this Commission is lifted.
2. That Trigen-Kansas City Energy Corp. and Thermal North America, Inc., are directed to file an answer to the complaint filed by the County of Jackson, Missouri, no later than April 29, 2005.
3. That this Report and Order shall become effective on April 15, 2005.

Davis, Ch., Murray, Gaw, Clayton and Appling, CC.,
concur and certify compliance with the provisions of
Section 536.080, RSMo 2000.

In the Matter of the Application of Aquila, Inc., for Specific Confirmation or, in the Alternative, Issuance of a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Combustion Turbine Electric Generating Station and Associated Electric Transmission Substations in Unincorporated Areas of Cass County, Missouri, Near the Town of Peculiar.*

*Case No. EA-2005-0248
Decided April 7, 2005*

Certificates § 11. A certificate of convenience and necessity is required only when an electric corporation starts business, or it attempts to serve a new area. That corporation does not need a certificate to build plant in its existing service area.

Electric § 3. An electric corporation does not need a certificate to build plant in its existing service area. The certificate allows the corporation to exercise the powers it already has, including building plant.

Electric § 30. An electric corporation may construct plant in its service territory without getting a site-specific certificate. The certificate allows the corporation to exercise the powers it already has, including building plant.

Service § 18. An electric corporation has the duty to provide safe and adequate power to the area it serves. The Commission cannot interfere with the corporation's management; the Commission's duty is to determine where the corporation is obligated to serve.

**ORDER CLARIFYING PRIOR CERTIFICATES
OF CONVENIENCE AND NECESSITY**

Syllabus: This order clarifies prior certificates of convenience and necessity of Aquila, Inc., and confirms that, in order to serve its customers, Aquila has already been granted specific authorization to build its South Harper Facility and Peculiar Substation.

Background

In October 2004, Aquila, Inc., began land clearance and site preparation in the unincorporated area in Cass County, Missouri, near the City of Peculiar for the installation of a peaking power facility comprising three 105-MW, natural gas-fired combustion turbines and an associated electric transmission substation, collectively referred to as the "South Harper Facility." The South Harper Facility is immediately adjacent to a gas compressor facility operated by Southern Star Gas Pipeline that will provide natural gas for the operation of the new peaking power facility. This facility will replace part of Aquila's current capacity represented by a Power Purchase Agreement dated February 22, 1999, that expires on May 31, 2005.

* The Commission, in an order issued on May 3, 2005, denied applications for rehearing. This case was appealed to Cass County Circuit Court (CV105558CC). On March 7, 2006, the Commission issued an order to vacate prior judgment in this case.

Aquila also began land clearance activities in preparation for the construction of a related electric transmission substation in Cass County, Missouri, approximately two miles northwest of Peculiar at a location adjacent to the intersection of an existing 345 kv electric transmission line and an existing 69 kv electric transmission line, each of which is owned by Aquila. Aquila refers to this as the "Peculiar Substation." Both parcels of property are located within Cass County and are in Aquila's certificated areas identified in the Commission's 1938 certificate of convenience and necessity.¹

In response to Aquila's site preparation activities, separate petitions for injunctive relief were filed by Cass County, Missouri, and StopAquila.org, an unincorporated association of individuals made up of area residents who oppose Aquila's plans. These lawsuits were filed in the Circuit Court of Cass County, Missouri. The lawsuits challenged Aquila's right to construct the South Harper Facility and the Peculiar Substation claiming, among other things, that the provisions of Section 64.235, RSMo 2000, providing for the conformance of improvements to the county's master plan superseded the authority of Aquila's certificates of convenience and necessity. In the alternative, the lawsuits asserted that Section 64.235, RSMo, imposed additional requirements on Aquila to seek more specific authority from the Commission to construct and operate the South Harper Facility and Peculiar Substation.

The two cases were consolidated, and following an evidentiary hearing the Cass County Circuit Court, in Case No. CV104-1443CC, issued a Permanent Injunction on January 11, 2005. Aquila posted an appeal bond on that same date that was approved by the circuit judge and that stayed the injunction portion of the Final Judgment while Aquila appeals the order.

On January 18, 2005, Aquila filed a Notice of Appeal at the Missouri Court of Appeals, Western District. The court assigned the case W.D. Case No. 64985. The case is on the court's April docket for oral argument.

On January 28, 2005, Aquila, Inc., filed an application asking the Commission to clarify that its prior certificates of convenience and necessity specifically authorize Aquila to build the South Harper Facility and its Peculiar Substation. In the alternative, Aquila asks the Commission to grant a site-specific certificate of convenience and necessity to build these electric facilities. Aquila asks for this relief so that it can continue, without hindrance, the construction of its South Harper Facility and Peculiar Substation. In its application, Aquila noted that the circuit court's order in Case No. CV104-1443 required Aquila to obtain "specific authorization" from the Commission pursuant to Section 64.235, RSMo, to build the plant, and that Aquila had not done so. StopAquila.org and Cass County intervened before the Commission, and oppose Aquila's application.

Discussion

As noted, Aquila has requested relief in the alternative: (1) a new site-specific certificate of convenience and necessity for the South Harper Facility and Peculiar

¹ *In re the Application of the Missouri Public Service Corporation*, 23 MO.P.S.C. 740 (1938); *In re the Application of the Missouri Public Service Corporation*, Case No. 11,892 (April 28, 1950).

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Substation; or (2) a clarification of its existing certificates of convenience and necessity showing that Aquila is specifically authorized to construct the South Harper Facility and the Peculiar Substation. For the reasons stated below, the Commission finds that Aquila's existing certificates give it the authority it needs to build the South Harper Facility and the Peculiar Substation. In deciding this, the Commission must review and interpret the prior certificates it granted Aquila. The Commission has authority to do so.²

Aquila and its predecessors in interest have been doing business in Missouri since 1916. Aquila's predecessor was granted a franchise by Cass County in 1917 that was perpetual in nature. As the utility began to grow and expand its operations, Aquila's predecessors were granted three certificates of convenience and necessity by the Commission.

In 1921, Aquila's predecessor sought the Commission's permission to reorganize as a newly named company and to increase its capitalization. The Commission granted the request in a preliminary order stating the following:

“ . . . that the **present and future public convenience and necessity** require the exercise by the said new company [West Missouri Power Company] of all the rights, privileges and **franchises to construct, operate and maintain electric plants** and systems in the State of Missouri and respective counties and municipalities thereof, now acquired or controlled by Applicant, Green Light and Power Company.”

(emphasis added).³

In that same case, the Commission granted a subsequent order in 1922, setting forth how West Missouri Power Company was required to use the capital that the Commission permitted it to raise. The Commission specifically directed how those funds were to be used:

“That the said West Missouri Power Company shall sell the said stock hereby authorized . . . and that the proceeds thereof shall be applied to the following purpose:

For extensions and additions to distributions systems and street lighting systems now or hereafter owned by said company in Jackson, **Cass** [and other] counties and for the reimbursement of monies heretofore or hereafter actually expended from the income of the company for the **acquisition of property, the construction, completion, extension or improvement of the plants** or distribution systems of said Company”

(emphasis added).⁴

² See, e.g., *Missouri Pacific Freight Transport Company v. Public Service Commission*, 312 S.W.2d 363, 365 (Mo.App. 1958); *State ex. rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 598 (Mo.banc 1964).

³ See *In re Green Light and Power Co.*, Case No. 3171 (December 6, 1921).

⁴ See *In re Green Light and Power Co.*, Case No. 3171 (March 21, 1922).

In 1938, the Commission granted another of Aquila's predecessors a certificate to serve Cass County.⁵ Finally, in a 1950 merger case, the Commission granted Aquila's predecessor a certificate of convenience and necessity to

“ . . . own, maintain and operate all properties and assets, and to acquire, hold and exercise all contracts, franchises, permits and rights now held and possessed by Missouri Public Service Corporation; **including, without limitation, all rights to construct, own and maintain electric utility facilities** in the areas of the State of Missouri described and designated in the order of this Commission entered in Case No. 9470 on January 18, 1938.”

(emphasis added).⁶

All of these orders are conclusive, and free from collateral attack.⁷ The Commission will reconcile these orders to mean that Aquila already has specific authority from the Commission to build the proposed plant.

Specific Authorization

The Court of Appeals has held that utilities desiring to build additional facilities within their certificated area need not seek additional authority from the Commission to proceed.⁸ The *Harline* court interpreted the grant of a certificate of convenience and necessity to be a triggering mechanism for the utility to exercise the corporate powers it already has under Sections 351.385 and 393.010, RSMo. Those powers include the power to purchase and develop real property and to exercise all powers necessary or convenient to affect any or all of the purposes for which the corporation was formed.⁹ In addition, Section 393.010, RSMo, grants an electric utility the “full power to *manufacture* and sell and to furnish such quantities of . . . electricity . . . as may be required” (emphasis added).¹⁰

In interpreting Section 393.170, RSMo, which authorizes the Commission to grant certificates of convenience and necessity, the *Harline* court held that this section constituted the “permission and approval” of the Commission. Further, the court stated that such a certificate was only required: (1) for any *new* company or *additional* company to *begin* business anywhere in the state; or (2) for any established company to enter into *new territory*.¹¹ Thus, a certificate of convenience and necessity is only needed when an electric utility corporation starts business or if it attempts to expand its authority in an entirely new area. The court, however,

⁵ See *In re the Application of the Missouri Public Service Corporation*, 23 Mo. P.S.C. 740 (1938).

⁶ See *In re the Application of the Missouri Public Service Corporation*, Case No. 11,892 (April 28, 1950).

⁷ Section 386.550, RSMo 2000.

⁸ See *Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177 (Mo.App. 1960).

⁹ *Id.* at 180-81.

¹⁰ *Id.*

¹¹ *Id.* at 182 (emphasis supplied).

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left open the possibility that an electric utility might have to seek a specific certificate of convenience and necessity for the construction of new plant facilities, citing to Section 393.170.1, RSMo.¹²

In a subsequent case, the Commission dispensed with the need for an existing electric utility to seek a certificate of convenience and necessity to build a plant in an area where it already held an area certificate. Following the logic of *Harline*, the Commission found that the statutory power granted in section 393.170, RSMo, was “a tool to regulate competition between utilities and to avoid the needless duplication of electric facilities.”¹³ The Commission concluded that “a certificate is only needed when an electric corporation starts in business or if it attempts to expand its authority in an entirely new area,” even when constructing plant.¹⁴

By the grant of area authority and by the natural duties that a corporation is obligated to under its charter, an electric utility corporation has the duty to provide safe and adequate power to the area that it serves. The Commission cannot interfere with the management and exercise of these duties; its only authority is to determine where the electric utility is obligated to provide service. The Commission, in applying *Harline* and *Union Electric*, again must conclude that an electric utility need not apply for any additional certificate of convenience and necessity to build plant in its certificated areas to meet the need of power generation for that area. This has been the case since 1980. The Commission will continue to adhere to this ruling.

In the instant case, the Commission issued three orders to Aquila's predecessor corporations over the years in response to either an *expansion* into new territories or during a merger of companies. These orders contained **specific language** that outlined Aquila's existing authority to build or construct plants. In 1921, the Commission granted a certificate that specifically authorized Aquila's predecessor corporation “to construct, operate and maintain electric plants” in its authorized territory. In 1922, in the same case, the Commission specifically ordered Aquila's predecessor corporation to expend additional income on the “construction, extension or improvement of the plants or distribution systems of said Company” in Cass County and other authorized territories. And finally, in 1950 following the merger of Aquila's predecessor corporation, the Commission transferred all rights of the predecessor to the new corporation, “including, without limitation, all rights to construct, own and maintain electric utility facilities” in its authorized territories, which included unincorporated areas of Cass County. As the successor corporation to these prior entities, Aquila retains the authority granted by these three certificates and already has the necessary authority to build electric generation facilities within its certificated areas.

The Commission recognizes, however, that Aquila is under order by the Circuit Court of Cass County to obtain “specific authorization” for construction of the South Harper Facility and the Peculiar Substation pursuant to the language in Section

¹² *Id.* at 185.

¹³ See *In re Union Electric Company*, 24 Mo.P.S.C. 72, 77 (1980).

¹⁴ *Id.* at 78.

64.235, RSMo. Therefore, the Commission finds under the broad authority for oversight of electric utilities found in Chapters 386 and 393, RSMo, and pursuant to the ruling by the Cass County Circuit Court under Section 64.235, RSMo, that Aquila has specific authority under its existing certificates to construct and operate the South Harper Facility and Peculiar Substation, both of which are fully contained within Aquila's certificated area.

IT IS THEREFORE ORDERED:

1. That the Commission confirms that the Commission has already granted Aquila, Inc., under its existing certificates of convenience and necessity, specific authorization to construct plant anywhere in its service territory, specifically including, but not limited to, the specific authorization to install, acquire, build, construct, own, operate, control, manage and maintain an electric power generation station comprised of three 105-MW, natural gas-fired combustion turbines and an associated transmission substation, transformers and breakers together with any and all other installations, facilities, structures, fixtures and equipment related thereto for the production and transmission of electric power and energy at the following described location in Cass County, Missouri:

The Southeast Quarter (SE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-Nine (29), and the Northeast Quarter (NE $\frac{1}{4}$) of the Northeast Quarter (NE $\frac{1}{4}$) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32).

2. That the Commission confirms that the Commission has already granted Aquila, Inc., under its existing certificates of convenience and necessity, specific authorization to construct plant anywhere in its service territory, specifically including, but not limited to, the specific authorization to install, acquire, build, construct, own, operate, control, manage and maintain an electric transmission substation together with any and all other associated installations, facilities, structures, fixtures and equipment related thereto for the transmission of electric power and energy at the following described location in Cass County, Missouri:

Beginning at the Northwest corner of the Northwest Quarter (NW $\frac{1}{4}$) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW $\frac{1}{4}$ a distance of 2,508.18 feet more or less to the South line of said NW $\frac{1}{4}$; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning.

This plot contains approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road.

3. That this ruling is not binding for ratemaking or financing purposes, and that the Commission reserves the right to consider the treatment to be given the described plant additions in a subsequent proceeding or proceedings.

4. That all pending motions are denied as moot.

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5. That this order shall be effective on April 17, 2005.
6. That this case may be closed on April 18, 2005.

Murray and Appling, CC., concur;
Davis, Ch., concurs, concurrence to follow;
Clayton, C., concurs, opinion to follow;
Gaw, C., dissents, dissent to follow

Pridgin, Regulatory Law Judge

Concurring Opinion of Commissioner Jeff Davis

As a matter of law, I concur with the Commission's Order clarifying prior Certificates of Convenience and Necessity that Aquila already possess. The prior Certificates give Aquila the authority to serve Cass County and to build plants as necessary to fulfill that obligation. However, there were numerous ex parte complaints filed in this case concerning Aquila's conduct that were not relevant to the legal disposition of this case but are deserving of further discussion.

In summary, many of the ex parte complaints filed in this case describe the feelings of Aquila's Cass County neighbors regarding their dissatisfaction with the company's approach in deciding to locate the plant and physically constructing it near their homes. It is apparent that a significant number of the people filing ex parte communications with the Commission view Aquila as being unresponsive to local feelings and opinions, as well as heavy handed. There were also questions as to whether the plant itself was a prudent decision.

Subsequent to the local hearing in Harrisonville, Missouri, Aquila filed a response to the numerous issues raised by its future neighbors at the local hearing. This Commissioner's impression from reading Aquila's filing is that Aquila tacitly acknowledged the security company it hired to patrol the site may have been overzealous in its patrolling of the area. Aquila further argued in its response that it made reasonable efforts to inform their neighbors of its plans to build a plant and the necessity thereof. Obviously, Aquila was not successful.

Based on my impression of the facts presented so far, I would admonish Aquila to be more considerate of the customers they serve and to treat their neighbors as Aquila would want to be treated. Aquila's customers may not have a choice right now, but it is conceivable they might have a choice at some point in the future. Further, Aquila's customers certainly have no incentive to cooperate with Aquila in any future proceeding that might require their consent or that of the Office of Public Counsel.

In conclusion, this case was not the proper venue for the questions raised in the ex parte pleadings and the testimony at the local public hearing, but the next rate case will be the proper venue for the parties to raise all the issues including, but not limited to, whether the construction of this plant was prudent and whether the company should be penalized for poor management. Many of the sentiments expressed in this case should be expressed at that time and the Commission will

have the opportunity to make a decision after considering all the facts relevant to these questions.

Dissenting Opinion of Commissioner Steve Gaw

I respectfully dissent from the majority's order. First, the majority's decision comprises an inappropriate collateral attack on the order of the Cass County Circuit Court which is currently on appeal to the Western District. Second, the majority's order incorrectly interprets past Commission orders as having granted authority for construction of a generation facility anywhere the utility chose within its certificated service area. Finally, the majority's order appears to be an improper interpretation of the Harline decision, *State ex. rel. Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177 (Mo. Ct. App. 1960).

This case came about after Aquila, Inc. (Aquila) had lost a decision in the Circuit Court of Cass County. In that decision the Court determined that Aquila did not have the required authority to construct a generation facility in an agricultural/residential area in Cass County outside of Peculiar, Missouri. After a hearing requesting injunctive relief the Circuit judge found that:

... [E]ither Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, and that Aquila's 1917 Franchise with Cass County does not; or that Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not.

Aquila filed two cases with the Missouri Public Service Commission after the ruling, one involving financing of the construction and the other a two-count request for an order regarding siting. The first count requested clarification from the Commission that the previous orders regarding Aquila's certificates of convenience and necessity in Cass County provided authority for Aquila to construct the plant. In the event the Commission did not find such authority already exists, the second count was a request for specific authority to construct the facility. The Commission began the hearing but terminated it prior to its conclusion – issuing an order on the first count clarifying that the requisite authority from the Commission already existed.

I. Collateral Attack

Noticeably, the Cass County Circuit Court has previously ruled on the very same issue the Commission is now asked to rule upon: whether Aquila has pre-existing authority sufficient to allow construction of the facilities. The Court, reviewing the very same documents that are now being examined by the Commis-

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sion, concluded that insufficient authority exists. Although an argument could have been made that the initial interpretation of the utility's authority previously granted by the Public Service Commission should be made at the Commission, the parties were applying for injunctive relief that the Public Service Commission did not have the authority to deliver. Furthermore, no party argued that the Circuit Court halt its proceedings until a case could be filed at the Commission. Instead, Aquila made its request only after it had lost its argument in Circuit Court. Aquila now seeks to collaterally attack the Circuit Court's decision at the Public Service Commission.

This Commission does not have the authority to overrule the Circuit Court's decision. Only the Western District or the Supreme Court can do that. If the Court of Appeals finds an error in the decision it will be the Court's sole responsibility to correct such error. As such, this case should be dismissed in Count 1 based on the fact that the matter has been decided by the Circuit Court of Cass County and would be an inappropriate collateral attack on such decision.

II. Past Commission Decisions

Even had this matter been appropriately placed before the Commission, further analysis does not lead to the majority's conclusion. Even if some general authority might be found in previous orders of the Commission to have an electric generation plant constructed in Cass County (which does not appear to exist), it is not the specific authority for construction of a generation facility which should be required under §393.170.1 RSMo and which has been sought by the Cass County Circuit Court. Yet, this is the conclusion reached by the majority of the Commission and indeed the Commission that rendered the decision in Case No. EA-79-119¹.

The Commission's past orders regarding Aquila's certificates do not grant authority to construct generation facilities in Cass County. The majority's attempt to characterize the past orders as having granted such authority should fail when read together. The first order from the Public Service Commission cited its "Application of Authorization of the Reorganization of Green Light & Power Company and for an order authorizing the issuance of stocks and bonds"². The order in pertinent part stated:

... [T]he Commission finds that the present and future public convenience and necessity require the exercise by the said New Company of all the rights, privileges and franchises to construct, operate and maintain electric plants and systems in the State of Missouri and respective counties and municipalities thereof, now acquired or controlled by applicant, Green Light and Power Company. [emphasis added]

This order simply transferred existing authority of Green Light & Power to a new company, West Missouri Power Company. No additional authority was conferred and Aquila has not shown that the authority thus transferred pursuant to this order contained any right to build generation facilities in Cass County.

¹ *In re Union Electric Company*, 24 Mo. P.S.C. (N.S.) 72 (1980).

² Mo. Public Service Commission Case No. 3171 (1921).

In a subsequent order the Commission authorized the issuance of preferred stock for the purpose of:

... [E]xtensions and additions to distribution systems and street lighting systems now or hereafter owned by said company in Jackson, Cass, Bates, Henry, Lafayette, Johnson, Cedar, St. Clair, and Vernon Counties and for the reimbursements of moneys heretofore or hereafter expended for the acquisition of property, the construction, completion extension or improvement of the plants or distribution systems of said company; provided, that before any stock shall be issued for the reimbursement of moneys actually expended from income, a detailed statement of such expenditures shall be filed with and approved by the Commission ...

Again, nothing in this order gives authority for construction of generation facilities in Cass County. The order merely authorizes the issuance of preferred stock and restricts the use of the proceeds.

In 1938 the Commission entered an order in Case No. 9470. The order is important in that it appears to be the foundation upon which the majority bases its decision. The order, however, only grants authority to construct, maintain and operate electric transmission lines and distribution systems over, along and across the highways of several counties including Cass, and along such other routes as may be properly provided for in such counties and along private right of ways as may be secured by the utility. The order grants authority for the utility to serve all persons in the area for which the certificate is being granted in conformance with extension rules that the applicant has on file with the Commission, it is clear that the order does not pertain to generation facilities. In fact, the Harline court interpreting this same certificate concluded that it did not extend to the construction of generating facilities.

The last order mentioned is Case Number 11,892 decided in 1950. This order simply conveys to the Missouri Public Service Company all of the rights given to the Missouri Public Service Corporation in the 1938 Case No. 9470 order. There is no additional authority given.

Aquila could not either here or in the Cass County Circuit Court show where authority was given to construct generation in Cass County. The majority of the Commission found language in the orders referring to electric facilities and it is understandable how it could jump to the conclusion that the authority was granted. However, all such references were broad-brush transfers of whatever authority a predecessor possessed. None of the orders except the 1938 order granted additional authority and that order only pertained to transmission and distribution systems.

III. Misreading of Harline

If the majority is correct, the most disturbing thing about this case is the lack of protection of private property rights under Missouri law. If a utility wishes to put a generation facility in a residential neighborhood or as one citizen put it, next to the

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Nelson Art Gallery or next to a school, there is no entity that could stop such construction. It would not matter whether the siting is or is not in the public interest so long as the construction is within the certificated area of the utility, for there is no Court or administrative body that has the authority to stop it³. This is the reading that many, including the majority, have given the Harline case.

A close reading of Harline does not necessarily produce that conclusion. Harline only concerned the expansion of transmission (and distribution) lines. In fact the Harline court examined many of the same orders of the Public Service Commission which were analyzed here and by the Cass County Circuit Court. In the Kansas City Court of Appeals the appellants argued that transmission lines were electric plant and that specific prior approval under 393.170.1 was needed before expansion could occur. The Court rejected this argument and seemed to say that transmission is not “electric plant” and therefore does not require additional authority beyond that already granted under section 393.170.2 service area certificate requests.

The court states:

Appellants claim that sub-section 1 of Section 393.170 required the company to obtain an additional certificate to construct the transmission line. They say, with no authority except a reference to the statutory definition of “electric plant”, that a transmission line is an “electric plant”. Hence, it is argued, as no electric plant can be constructed without approval, and as a transmission line is an electric plant, therefore a transmission line must have approval. We do not share those views. Sub-section 2⁴ has no application. The record of this case shows that the company’s electric plant had been constructed prior to 1938 and operated continuously since.

It is important to note this case does not deal with transmission expansion; it is about the siting of generation units and a substation. The Court in Harline found a reason to draw a distinction:

Certificate “authority” is of two kinds and emanates from two classified sources. Sub-section 1 requires “authority” to construct an electric plant. Sub-section 2 requires “authority” for an established company to serve a territory by means of an existing plant. *Peoples Telephone Exchange v. Public Service Comm.*, 239 Mo. App. 166, 186 S.W.2d 531⁵.

³ It should be noted that permits for meeting environmental standards must be obtained from the Department of Natural Resources but such permits do not substitute for a public interest review.

⁴ It seems plausible that the Court meant sub-section 1 rather than sub-section 2.

⁵ Id 183.

We have no concern here with Sub-section 1 "authority". The 1938 certificate permitted the grantee to serve a territory – not to build a plant [emphasis added]. Sub-section 2 "authority" governs our determination.

Under the Harline decision, construction of new electric generation plants, not including transmission and distribution lines, seem to require specific siting preapproval. Utilities in Missouri have been granted great power in exchange for the distribution of needed electricity in a growing nation. However, the grant of that power has always had some public interest oversight. If the majority is correct, in Missouri, there is no public interest analysis given to the siting of power plants – whether they be gas, coal, or nuclear. A certificate given to a utility to serve a territory covers large geographic areas. The Legislature could not have believed that the Commission, prior to granting a certificate, would analyze every possible location of a power plant within a proposed certificated area. Such a task would be impossible. In fact, the granting of such certificates does not include public policy reviews for siting generation facilities. The object of the grant is to give utilities the opportunity to serve the territory as a monopoly and the responsibility of providing adequate service to its customers within the territory. If the Public Service Commission does not conduct public interest reviews do they occur elsewhere? Certainly not in a condemnation process. The objective in that procedure is to determine the fair market value of the property condemned – not to scrutinize the utilities selection of a site. In a rate case the only analysis done by the Public Service Commission as to siting is after the plant is constructed and being used to determine whether expenditures were prudent.

The Western District has an opportunity to clarify the rights of property owners in the case from the Circuit Court in Cass County. The Court will have the ability to revisit the Harline case and state whether siting of generation facilities should be to be treated differently than transmission and distribution lines. It will also have before it the issue of the authority of counties in general or counties of the class of Cass County specifically to restrict siting by not granting sufficient authority in a franchise to construct generation. Further the Court could tackle the issue of the impact of zoning on such siting. Is it irrelevant and immaterial, is it important, or, is appropriate zoning required because of the unique circumstances tied to Cass County's classification? Most importantly, I hope the court takes the opportunity at a minimum to clarify the Harline case and provide the kind of public interest review of siting large generation facilities that the citizens of this state and their private property rights deserve.

**Staff of the Missouri Public Service Commission, Complainant,
v. BPS Telephone Company, Respondent.**

*Case No. TC-2002-1076
Decided April 12, 2005*

Telecommunications §8. The Commission approved a stipulation and agreement between the Staff of the Commission, BPS Telephone Company and the Office of the Public Counsel whereby BPS would reduce its earnings by \$460,000.

Telecommunications §34. The Commission approved a stipulation and agreement entered into between the Staff of the Commission, BPS Telephone Company and the Office of the Public Counsel whereby customers in Bernie, Parma and Steele, Missouri, will have expanded local one-way calling.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the Stipulation and Agreement resolving the Staff of the Commission's over-earnings complaint against BPS Telephone Company.

Background

The Staff of the Commission filed a complaint against BPS Telephone Company alleging that the company had annual over-earnings of \$852,419. BPS proposed a revenue reduction of \$376,204. On March 11, 2005, Staff, BPS and the Office of the Public Counsel filed a Stipulation and Agreement, agreeing to an earnings reduction of \$460,000. Having been granted intervention by the Commission, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, filed a letter stating that it does not oppose the agreement.

The Stipulation and Agreement

Based on a revenue reduction of \$460,000, the parties agreed that BPS would provide expanded one-way calling for its customers in Bernie, Parma and Steele, Missouri. Customers in Bernie would be able to call numbers in Parma and Malden, Missouri at no extra charge. Customers in Parma would likewise be able to call numbers in Bernie, Risco, New Madrid, Lilbourn and Essex. Customers in Steele would be able to call numbers in Caruthersville, Hornersville and Deering. The expanded local calling will cost BPS approximately \$379,993 in lost revenue. Additionally, the parties agreed that BPS would reduce its intrastate access rates, resulting in an \$80,000 reduction of the company's revenues. The parties also agreed that BPS would implement certain depreciation rates filed with the agreement as Attachment C. Although SBC did not join in the Stipulation and Agreement, it does not oppose the agreement.

Discussion

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ The Commission notes that every decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.² Consequently, the Commission need not make findings of fact or conclusions of law in this order.

Commission rule 4 CSR 240-2.115 (2)(C) states that if no party objects to the Stipulation and Agreement, the Commission may treat the agreement as unanimous. Because SBC has indicated that it does not oppose the agreement, the Commission will treat the agreement as unanimous.

The Commission has reviewed the facts of this case and the Stipulation and Agreement and finds that the agreement is reasonable. The Commission will therefore approve the agreement, direct that the parties to the agreement comply with its terms and direct BPS to file tariff sheets, in a separate case, reflecting the terms of the agreement.

IT IS THEREFORE ORDERED:

1. That the unanimous Stipulation and Agreement, filed on March 11, 2005, and entered into by the Staff of the Commission, BPS Telephone Company, and the Office of the Public Counsel is approved. A copy of the agreement is attached as Attachment A.
2. That all parties to the Stipulation and Agreement are ordered to comply with its terms.
3. That BPS Telephone Company shall file with the Commission tariff sheets, in a separate case, reflecting the terms of the agreement.
4. That this order shall become effective on April 22, 2005.
5. That this case may be closed on April 23, 2005.

Davis, Chm., Murray, Gaw,
Clayton, and Appling, CC., concur.

Jones, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

¹ Section 536.060, RSMo 2000.

² Section 536.090, RSMo 2000.

**In the Matter of the Proposed Acquisition of AT&T Corporation
by SBC Communications, Inc.**

*Case No. TM-2005-0355
Decided April 19, 2005*

Evidence, Practice and Procedure §2. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order closing case because they had no jurisdiction over transactions at the holding company level.

Public Utilities §7. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order closing case because they had no jurisdiction over transactions at the holding company level.

Telecommunications §7. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order closing case because they had no jurisdiction over transactions at the holding company level.

Telecommunications §36. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order closing case because they had no jurisdiction over transactions at the holding company level.

ORDER CLOSING CASE

Syllabus: The Commission finds that it has no jurisdiction over a merger between SBC Communications, Inc. and AT&T Corporation. In light of its lack of jurisdiction, the Commission rejects a request by the Office of the Public Counsel to conduct an investigation into the transaction.

On April 6, 2005, the Office of the Public Counsel filed a document entitled "Comments of the Office of the Public Counsel." Public Counsel asks the Commission to "conduct an investigation, including evidentiary hearings and public hearings, into the proposed merger of AT&T Corp. and SBC Communications Inc." Public Counsel does not allege that the Commission has authority to approve or disapprove the merger, but instead urges the Commission to investigate the merger and convey the results of that investigation to the Federal Communications Commission and the Department of Justice – entities that do have authority to approve or disapprove the merger.

On April 12, 2005, the Commission issued an order making AT&T Communications of the Southwest, Inc. and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri parties to this case, and directing them and the Commission's Staff to respond to Public Counsel's comments.

On April 12, 2005, AT&T and SBC Missouri, along with TCG St. Louis and TCG Kansas City, jointly filed a response. AT&T, SBC and TCG argue that it would be inappropriate to conduct the investigation requested by Public Counsel because the Commission does not have the authority to approve the proposed merger under

any Missouri statute. AT&T, SBC and TCG describe the subject transaction as follows:

Pursuant to the Parties' agreement, a wholly owned subsidiary of SBC Communications, Inc., Tau Merger Sub Corporation ("Tau"), will be created specifically for the purpose of consummating the transaction. Tau will merge with and into AT&T Corp., with AT&T Corp. being the surviving entity. At the time of the SBC/AT&T merger, shareholders of AT&T Corp. will exchange their stock for SBC stock. Following the merger, AT&T Corp. will become a wholly owned subsidiary of SBC. There is no change in the ownership structure of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, as a result of the transaction, nor is there a change in the ownership of SBC Long Distance or SBC Advanced Solutions, Inc., the other SBC-affiliated entities subject to the Commission's regulatory authority. Similarly, the transaction will not result in a change in ownership of those entities affiliated with AT&T Corp., which are subject to the Commission's authority. The AT&T affiliated entities operating in Missouri, which are comprised of AT&T Communications of the Southwest, Inc., TCG St. Louis, and TCG Kansas City, will continue to be owned by the same entities after the transaction is completed as they are today.

AT&T, SBC and TCG argue that the statute (Section 392.300.2, RSMo 2000) that might otherwise give the Commission jurisdiction over telecommunications companies is not applicable to this merger for three reasons. First, the statute only applies to domestic telephone companies and none of the entities involved in the proposed merger are Missouri corporations. Second, the statute does not confer jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies. Third, for AT&T and TCG, the Commission waived the applicability of Section 392.200.2 when it granted them certificates of service authority.

The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level, and it will adhere to that position here. Thus the only question is whether the Commission, despite its lack of direct authority over the transaction, should nonetheless conduct an investigation of its possible effects. Public Counsel has not alleged that those entities that do have jurisdiction over the transaction will be lax in their oversight, and the Commission has no reason to believe they will be. The Commission concludes that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise. The Commission will not conduct an investigation into the proposed transaction, and will close this case.

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IT IS THEREFORE ORDERED:

1. That this case is closed.
2. That all motions not previously ruled upon are denied.
3. That this order shall become effective on April 19, 2005.

Davis, Chm., and Appling, C., concur
Murray, C., concurs, concurring opinion attached
Gaw and Clayton, CC., dissent, dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order today, the Commission, by a simple majority, voted to close the case before them finding that it did not have jurisdiction to oversee the merger of the parent companies, SBC Communications, Inc., and AT&T Corporation that are not subject to Commission oversight. The Commission also found that an investigation was duplicative and unnecessary in light of the fact that the Commission did not find, and the Public Counsel failed to allege that the entities which do have jurisdiction over the transaction will be lax in their oversight.¹

While I voted in favor of the order closing the case, I believe the Commission should have addressed the Office of Public Counsel's allegation that the Commission had jurisdiction under section 386.330.1, RSMo 2000, to conduct a formal investigation into the merger of the parent companies and its effect on Missouri consumers. By failing to address this claim in a direct manner, the Commission has left open the question of its authority under this section. The inference now is that the Commission can open investigations under section 386.330.1, RSMo without concern for the threshold requirements established by law, whenever it questions the vigilance of the Federal Communications Commission ("FCC").

In paragraph 7 of its pleading, the Public Counsel stated, "the Commission under its general authority to conduct investigations in Section 386.330.1, RSMo should open a case to conduct an investigation into the impact the merger has on the telecommunications market, the ratepayers, and the public interest." The Public Counsel later makes several allegations that an investigation is needed to study the impact of the merger of the parent companies on the competitive markets of the Missouri-certified subsidiary companies.²

Section 386.330.1, RSMo provides as follows:

"The commission may, of its own motion, investigate or make inquiry, in a manner determined by it, as to any act or thing done or omitted to be done by any telecommunications company

¹ The federal agencies with jurisdiction to review the merger between the parent companies are the Federal Communications Commission and the Department of Justice.

² See Comments of the Office of the Public Counsel, pp. 2-5.

subject to its jurisdiction, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation in violation of any provision of law or in violation of any order or decision of the commission."

(emphasis added).

The Public Counsel did not assert that SBC Communications Inc. or AT&T Corporation, the parent companies involved in the merger, are "subject to [the commission's] jurisdiction" under section 386.330.1, RSMo. Indeed, such an assertion would fail as there is nothing in the Commission's authorizing statutes that confers jurisdiction to investigate two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.³ Nor does the public counsel allege that the Missouri-regulated subsidiaries of these companies have done or omitted doing an act that is "in violation of any provision of law or in violation of any order or decision of the commission". Without such allegations or independent Commission findings that the Missouri-regulated subsidiaries have violated the law or a Commission order, I believe the Commission has no choice but to dismiss the Public Counsel's request for a hearing pursuant to section 386.330.1, RSMo for lack of jurisdiction.⁴

Despite having reached this conclusion regarding the Public Counsel's request for a formal investigation, I see no reason why the Commission's staff could not review the available information and discuss the impact of the merger on the Missouri-regulated subsidiaries. The staff could then provide a recommendation to the Commission regarding any necessary comments to be forwarded to the FCC and the Department of Justice. Our staff routinely handles matters before the FCC in this way without the expense and time-consuming prospect of opening a formal investigation. It is my opinion that we should continue to handle issues within the FCC's jurisdiction in this same manner.

³ See, e.g., *In the Matter of the Merger of SBC Communications Inc. and Ameritech Corporation*, 7 Mo. P.S.C.3d 528 (1998), for an analogous finding regarding the Commission's authority to oversee mergers of parent companies not regulated in Missouri.

⁴ I would note that even if we had jurisdiction to open an investigation under section 386.330.1, RSMo, the timing of the Public Counsel's request would make this a near impossibility. A Public Interest Statement in this merger was filed at the FCC on February 22, 2005. The FCC issued a Public Notice on March 11, 2005, requesting comments from interested parties regarding the merger and setting April 25, 2005 as the deadline for such filings. (See Public Notice in WC Docket No. 05-65). The Public Counsel waited until April 6, 2005 to file its pleading before the Commission requesting an investigation – leaving the Commission less than three weeks to open a formal investigation into an extremely complex corporate merger in order to file comments with the FCC.

**DISSENTING OPINION OF COMMISSIONERS STEVE GAW
AND ROBERT M. CLAYTON III**

We respectfully dissent from the Order Closing Case issued by the majority in the above captioned proceeding. Through its Comments which initiated this docket, Public Counsel merely requests that the Commission undertake an investigation for the purpose of submitting “well-founded and informed recommendations” in the context of the reviews conducted by the Department of Justice and Federal Communications Commission.¹ As Public Counsel notes, “[t]he impact of the merger should be evaluated to gauge the extent to which it will reduce competitive pressures in SBC’s exchanges.”²

In its joint response to the OPC pleading, SBC & AT&T attempt to evade the purpose of OPC’s comments. As noted, OPC merely seeks an investigatory docket to analyze the effects of the proposed transaction on the Missouri local and interexchange telecommunications markets. In response, SBC / AT&T assert that it “would be inappropriate for the Commission to proceed with this case because the Commission does not have the authority to approve the proposed merger”.³ As such, SBC / AT&T request that the Commission “dismiss this case for lack of jurisdiction.”⁴

In its Order Closing Case, the majority, like SBC & AT&T, misconstrue the intent of OPC’s request. Despite its explicit recognition that “Public Counsel does not allege that the Commission has authority to approve or disapprove the merger”, the majority nonetheless devotes the vast majority of its Order to a discussion regarding the Commission’s lack of jurisdiction over a parent company transaction. In passing, the majority finds that Public Counsel has not alleged that the FCC and DOJ “will be lax in their oversight, and the Commission has no reason to believe they will be.”⁵ As such, the majority concludes “that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission’s lack of jurisdiction, a fruitless exercise.”⁶

¹ *Comments of the Office of the Public Counsel*, Case No. TM-2005-0355, filed April 6, 2005, at page 5.

² *Id.* at 4.

³ *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City’s Response to the Comments of the Office of the Public Counsel*, Case No. TM-2005-0355, filed April 12, 2005, at page 1. In its “no action” letter to the Commission dated February 28, 2005, SBC & AT&T tout the advantages of the transaction. “The parties believe the merger will strengthen SBC’s ability to provide all of the advanced, innovative communications and entertainment services that our customers have come to expect.” Ultimately, SBC & AT&T conclude that “[t]he merger should result in benefits for Missouri and the country”. Given its claims of alleged benefits for Missouri, the Commission should take SBC / AT&T on its assertions and provide the analysis to our federal colleagues.

⁴ *Id.* at page 10.

⁵ *Order Closing Case*, Case No. TM-2005-0355, issued April 19, 2005.

⁶ *Id.*

The Commission's position that such an investigation "would be redundant and duplicative" and, therefore, "a fruitless exercise", stands in stark contrast to its actions following the announcement of the SBC / Ameritech merger. Recognizing the obvious effect that the SBC/Ameritech merger would have on Missouri ratepayers, the Commission initiated a docket and held an on-the-record conference so that parties could "address what they believe[d] should be contained in the Commission's comments to the FCC regarding [the] merger."⁷ The Commission conducted this on-the-record conference despite SBC / Ameritech's claims that the Commission lacked jurisdiction to approve the transaction.

In addition to the SBC / Ameritech merger review, the Commission has routinely opened dockets or conducted investigations for the purpose of presenting well-informed comments and information to other agencies or the Missouri General Assembly. For instance, in February of 2004, the Commission issued an Order Establishing Case in Case No. TW-2004-0324 based upon an indication that the Federal Communications Commission would "soon issue a Notice of Proposed Rulemaking concerning Voice over Internet Protocol (VoIP) technology."⁸ Immediately prior to the Commission issuing its Order Establishing Case, the U.S. District Court for the District of Minnesota issued a decision which held that VoIP "is an information service and therefore not subject to state regulation".⁹ Despite the apparent lack of Missouri Commission jurisdiction, the Commission nonetheless found that the FCC rulemaking "will have an impact on telecommunications service in Missouri" and that a docket should be established under the Commission's general supervisory powers (Section 386.250) to "further [the Commission's] knowledge of VoIP technology and to assist in its preparation of comments to the FCC."¹⁰

Additionally, the Commission initiated a docket to study the issue of electric restructuring. In its Order Establishing Docket and Creating Task Force, the Commission notes:

Any decision to implement electric retail competition statewide in Missouri, not merely on an experimental basis, will require amendments to existing state law. While that policy decision must be made by the General Assembly and the Governor, the time has come for the Commission to establish a formal means to identify the risks and benefits that would face the State of Missouri in the event that retail competition occurs.¹¹

⁷ *Order Setting Oral Argument*, Case No. TM-99-76, issued September 8, 1998

⁸ *Order Establishing Case*, Case No. TW-2004-0324, issued February 3, 2004.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Order Establishing Docket and Creating Task Force*, Case No. EW-97-245, issued March 28, 1997.

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Despite its recognition that it lacked any authority to unilaterally implement any suggested changes, the Commission established the restructuring docket in order to “compile a comprehensive plan for implementation of retail electric competition in the State of Missouri in the event legislation is enacted which authorizes it.”¹²

Without conceding any issue regarding Commission jurisdiction to review the proposed transaction, it seems apparent that the Commission should follow past precedent and conduct an investigation in order to more fully enlighten itself regarding the state of competition in the SBC exchanges and the degree to which competition in those exchanges will be impacted by SBC’s acquisition of AT&T. The mere establishment of such a docket would not contain an implicit finding that the FCC or DOJ would be “lax in their oversight”, but instead would be a logical step in anticipation of filing comments as routinely requested by those agencies.

Because of its proximity to consumers in Missouri and its duties under the state and federal telecommunications statutes to examine the status of competition, this Commission has the ability to add valuable information and insight into the impact of this merger on Missouri consumers. Moreover, the Commission should be mindful of the apparent demise of interexchange service as a result of the pending acquisitions of both AT&T and MCI.¹³ Finally, the Missouri Commission has a responsibility to gather this information and to provide it, with critical analysis, to key elected policy makers. As the Missouri General Assembly prepares to modify state telecommunications laws and as Missouri’s Congressional delegation contemplates re-writing the Telecommunications Act of 1996, this Commission owes them the Missouri-specific data retrieved and compiled by Commission staff to protect Missouri consumers.

¹² *Id.*

¹³ See, Case No. TM-2005-0370 concerning the proposed acquisition of MCI by Verizon, Inc.

In the Matter of the Application for Authority of Sendero SMGC LP Acquisition Company and Sendero SMGC GP Acquisition Company to Purchase the Partnership Interests of DTE Enterprises, Inc. and DTE Ozark, Inc., in Southern Missouri Gas Company, L.P., and for Southern Missouri Gas Company, L.P., to Execute a Deed of Trust, Security Agreement and Financing Statement to Secure a Loan to Complete the Transaction.*

*Case No. GM-2005-0136
Decided April 26, 2005*

Accounting § 7. Sendero, DTE, and the Staff entered into a stipulation that would allow Sendero to buy DTE's interest in Southern Missouri Gas Company. Part of that stipulation was that Sendero would keep data related to affiliate transactions and corporate allocation of costs between its regulated and non-regulated operations.

Gas § 18. As part of the parties' stipulation, Sendero agreed to comply with DTE's and Southern Missouri Gas Company's commitments regarding ACA recommendations, and ACA over/under recovery balance.

Gas § 30. As part of the parties' stipulation, Southern Missouri Gas Company shall keep its books so that its plant in service balances can be segregated between amounts Southern Missouri Gas Company invested prior to closing, and the net original cost that Southern Missouri Gas Company claims may be invested following the closing date.

Service § 18. As part of the parties' stipulation, Sendero agrees to respond to interruption of service inquiries from the Commission's Consumer Service Department within one business day, and all other inquiries within three business days.

ORDER APPROVING NON-UNANIMOUS STIPULATION AND AGREEMENT AND APPROVING APPLICATION

Syllabus: This order approves the non-unanimous stipulation and agreement, and allows DTE Enterprises and DTE Ozark to sell its partnership interests in Southern Missouri Gas Company, L.P. to Sendero GP and Sendero LP.

Procedural History

On November 17, 2004, Sendero SMGC GP Acquisition Company, Sendero SMGC LP Acquisition Company, (collectively Sendero), DTE Enterprises, Inc., and DTE Ozark, Inc., (collectively DTE) jointly filed an application. That application asked the Commission to allow DTE Enterprises and DTE Ozark to sell its partnership interest in Southern Missouri Gas Company, L.P. to Sendero GP and Sendero LP.

* On May 26, 2005, the Commission issued an Order of Correction Correcting the Name of Applicant Sendero SMGC Limited Acquisition Company, LLC.

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Southern Missouri Gas Company is a Missouri limited partnership that owns and operates a natural gas transmission and distribution system in southern Missouri. It is a “gas corporation” and a “public utility” subject to the Commission’s jurisdiction.

DTE Enterprises is a Michigan corporation that owns the controlling general and limited partnership interests in Southern Missouri Gas Company. DTE Ozark is a Michigan corporation that is an affiliate of DTE Enterprises, and that was formed to facilitate buying limited partnership interests in Southern Missouri Gas Company.

Currently, DTE Enterprises owns 94 Class A Units of Southern Missouri Gas Company (the “DTE Limited Partnership Interest”), and 2 Class B Units of Southern Missouri Gas Company (the “General Partnership Interest”), which comprises 96% of SMGC’s outstanding partnership interests. DTE Ozark owns 4 Class A Units of Southern Missouri (the “DTE Ozark Limited Partnership Interest”). If the Commission approves the transaction, DTE Enterprises would sell the General Partnership Interest to Sendero GP, DTE Enterprises would sell the DTE Limited Partnership Interest to Sendero LP, and DTE Ozark would sell the DTE Ozark Limited Partnership Interest to Sendero LP. Afterwards, Sendero GP and Sendero LP would own all of the partnership interests in Southern Missouri Gas Company. The applicants included the sale agreement with the application.

The applicants state that the sale would not be detrimental to the public interest because the sale would not result in any reduced level of service or reliability. Further, the sale would not result in any rate changes to Southern Missouri Gas Company’s customers. Finally, the sale would not impact tax revenues of the Missouri political subdivisions in which any structures, facilities, or equipment of Southern Missouri Gas Company is located.

On December 1, The Empire District Electric Company asked to intervene. Empire stated that it gets natural gas from Southern Star Central Gas Pipeline, Inc. Southern Star also provides gas to Southern Missouri Gas Company. Empire further stated that Southern Star is fully subscribed, and is concerned that the proposed transaction could affect its gas supply. On December 16, the Commission granted Empire’s motion.

On March 30, Sendero and DTE filed their First Amended Application. The amended application included a revised sales agreement and pro-forma calculations.

Nonunanimous Stipulation and Agreement

On April 6, Sendero, DTE, and the Staff of the Commission submitted a Nonunanimous Stipulation and Agreement.¹ These parties agreed that the Commission should approve the application subject to certain conditions. A synopsis of the conditions is as follows:

1) Sendero and SMGC will not seek a cost of capital increase, and Sendero will ensure that Southern Missouri Gas Company’s ratepayers will not receive a rate increase, because of the transaction;

¹ The pleading accompanying the agreement stated that Empire and OPC did not take a position concerning the agreement, and that Empire and OPC would not request a hearing.

- 2) Sendero shall ensure that Southern Missouri Gas Company will continue to comply with all Commission rules;
- 3) Sendero and Southern Missouri Gas Company will keep data related to affiliate transactions and corporate allocation of costs between regulated and non-regulated operations of Sendero, Sendero Asset Management and Southern Missouri Gas Company;
- 4) Sendero, Sendero Asset Management and Southern Missouri Gas Company will keep time reporting and associated expenses billed to Southern Missouri Gas Company and other non-regulated affiliates of Sendero;
- 5) Sendero shall hire a full-time local general manager, and shall not change Southern Missouri Gas Company's key personnel, or Southern Missouri Gas Company's operating policies and procedures;
- 6) Sendero agrees that either it or Southern Missouri Gas Company will prepare detailed gas supply plans that include an evaluation of demand requirements, evaluations of hedging, economic cost evaluations, and gas supply/transportation reliability, to be provided to Staff every September 15;
- 7) Sendero agrees that Southern Missouri Gas Company will comply with DTE's and Southern Missouri Gas Company's commitments regarding historical annual ACA recommendations, ACA Case Stipulations and Agreements and Southern Missouri Gas Company's comments to Staff Recommendations, including carrying forward and ACA over/under recovery balance at the time of the sale;
- 8) Southern Missouri Gas Company agrees not to seek recovery of any acquisition premium for Sendero's purchase of Southern Missouri Gas Company; Southern Missouri Gas Company agrees not to seek recovery of any purported merger savings that would allow either direct or indirect recovery of the acquisition premium; Southern Missouri Gas Company shall keep its books so that its plant in service balances can be segregated between amounts Southern Missouri Gas Company invested prior to closing, and the net original cost that Southern Missouri Gas Company claims may be invested following the closing date; Sendero agrees that its purchase of Southern Missouri Gas Company is subject to Southern Missouri Gas Company's certificate conditions the Commission set forth in Case No. GA-94-127;
- 9) Southern Missouri Gas Company will provide surveillance reports to Staff each quarter;
- 10) Sendero, Sendero Asset Management, and Southern Missouri Gas Company agree on Sendero Asset Management's fee, and agree that it shall not increase by more than a certain percentage per year without Commission approval or until Sendero files a rate case;
- 11) The signatories shall not request a change in Southern Missouri Gas Company's non-PGA related gas rates, or rate credits or refunds respecting Southern Missouri Gas Company's non-PGA related gas rates, that would become effective for service rendered before May 1, 2008, unless a significant event that has a major impact on Southern Missouri Gas Company occurs;
- 12) Sendero will ensure that Southern Missouri Gas Company responds to interruption of service inquiries from the Commission's Consumer Services Department within 1 business day, and all other inquiries within 3 business days,

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and Sendero will give written notice of the sale to all customers in the acquired system;

13) Sendero will ensure that Southern Missouri Gas Company continues to use Commission-approved depreciation rates;

14) Sendero agrees that the Commission may protect Southern Missouri Gas Company's customers from any unintended detrimental effect that the transaction may have on those customers;

15) Sendero agrees that the Commission continues to have the authority to regulate Southern Missouri Gas Company;

16) Sendero agrees to give the Staff of the Commission and the Office of the Public Counsel access to its financial records, and its records concerning ratemaking, financing, safety, quality of service and other regulatory authority over Sendero.

Staff Recommendation

On April 13, the Staff of the Commission filed a Staff's Memorandum in Support of the Nonunanimous Stipulation and Agreement. In the memorandum, Staff detailed its reasons for supporting the sale. Staff stated its potential concerns regarding the sale, and stated what section of the Nonunanimous Stipulation and Agreement satisfied its concerns.

The Nonunanimous Stipulation and Agreement stated that parties had three days to respond to Staff's Recommendation. On April 18, Sendero filed a memorandum in support of the agreement.

Also, no parties objected to the Nonunanimous Stipulation and Agreement. Commission Rule 4 CSR 240-2.115(2)(C) states that if no party objects to a Nonunanimous Stipulation and Agreement within 7 days of its filing, the Commission may treat it as a Unanimous Stipulation and Agreement.

The Commission has reviewed the pleadings, and the Nonunanimous Stipulation and Agreement. The Commission finds the Nonunanimous Stipulation and Agreement reasonable, and will approve it. The Commission further finds the relief requested in the application reasonable, and will grant the application.

IT IS THEREFORE ORDERED:

1. That the Application filed by Sendero SMGC GP Acquisition Company, Sendero SMGC LP Acquisition Company, (collectively Sendero), DTE Enterprises, Inc., and DTE Ozark, Inc., as amended by the First Amended Application, is approved.

2. That DTE Enterprises, Inc., may sell its general partnership interest in Southern Missouri Gas Company, L.P., to Sendero SMGC GP Acquisition Company.

3. That DTE Enterprises, Inc., may sell its limited partnership interest in Southern Missouri Gas Company, L.P., to Sendero SMGC LP Acquisition Company.

4. That DTE Ozark, Inc., may sell its limited partnership interest in Southern Missouri Gas Company, L.P., to Sendero SMGC LP Acquisition Company.

5. That the Nonunanimous Stipulation and Agreement filed by Sendero SMGC GP Acquisition Company, Sendero SMGC LP Acquisition Company, DTE Enterprises, Inc., DTE Ozark, Inc., and the Staff of the Commission is approved.

6. That the signatories of the Nonunanimous Stipulation and Agreement shall be bound by that agreement.

7. That the sale described in paragraphs 1 through 4, as conditioned upon the Nonunanimous Stipulation and Agreement described in paragraphs 5 and 6, is not detrimental to the public interest.

8. That Southern Missouri Gas Company, L.P., may execute and deliver a Deed of Trust, Security Agreement and Financing Statement and/or other related financing documents, as required by the lender.

9. That this order shall become effective on May 6, 2005.

10. That this case may be closed on May 7, 2005.

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., absent

Pridgin, Regulatory Law Judge

Editor's Note: The nonunanimous stipulation and agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of Level 3 Communications, LLC, and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri for Approval of Their Negotiated Interconnection Agreement and Superseding Amendment under Section 252(e)(1) of the Telecommunications Act.

Case No. TK-2005-0285
Decided May 3, 2005

Telecommunications §36. The Commission approved an interconnection agreement that did not contain transiting traffic provisions, but ordered that when the parties reached such an agreement they must file it with the Commission for approval pursuant to Section 252(e) of the Telecommunications Act.

Telecommunications §36. An interconnection agreement that does not contain transiting provisions is not necessarily discriminatory toward other carriers and the mere absence of transiting traffic provisions in the submitted agreement cannot justify the rejection of that agreement.

ORDER APPROVING INTERCONNECTION AGREEMENT AND DIRECTING PARTIES TO FILE THEIR TRANSITING TRAFFIC AGREEMENT AS AN AMENDMENT TO THE INTERCONNECTION AGREEMENT

This order approves the interconnection agreement and superseding amendment executed and filed by the parties. The order also directs the parties to file their transiting traffic agreement with this Commission for the Commission's approval after that agreement is finalized.

On February 23, 2005, Level 3 Communications, LLC and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri jointly filed an application with the Commission for approval of an interconnection agreement and a superseding amendment to that interconnection agreement. The agreement was filed pursuant to Section 252(e)(1) of the Telecommunications Act of 1996.¹ Both SBC Missouri and Level 3 Communications hold certificates of service authority to provide basic local telecommunications services in Missouri.

On February 24, the Commission issued an order directing that any party wishing to request a hearing do so no later than March 16. No requests for hearing were filed. In that same order, the Commission ordered its Staff to file a recommendation regarding approval or rejection of the agreement by March 28.

After requesting and obtaining an extension of time, the Staff of the Commission filed a recommendation on April 11. Staff expressed concern about the absence of specific provisions in the interconnection agreement regarding transiting traffic.

Transiting traffic is traffic that passes between a Level 3 customer and a customer of another local exchange carrier with which Level 3 is not directly

¹ See 47 U.S.C. § 251, *et seq.*

physically interconnected. Since there is not a direct physical interconnection, such transiting traffic may be passed through the switches and lines of SBC Missouri before reaching its final destination.

Staff explained that the existing interconnection agreement between Level 3 and SBC Missouri has extensive provisions concerning transiting traffic, but that such provisions do not appear in the submitted agreement. Staff's recommendation voices a suspicion that SBC Missouri and Level 3 have reached a separate agreement regarding transiting traffic that they do not intend to file as part of their interconnection agreement. Staff argues that such a transiting traffic agreement must be filed as an amendment to the interconnection agreement and recommends that the Commission reject the submitted interconnection agreement as discriminatory and against the public interest if the transiting traffic agreement is not filed.

At the direction of the Commission, SBC Missouri and Level 3 filed responses to Staff's recommendation on April 22. Level 3's response indicates that it and SBC Missouri have reached an agreement in principle regarding transiting traffic but that the terms of that agreement have not been finalized or executed. Level 3 takes no position on the question of whether the transiting traffic agreement ultimately needs to be filed with this Commission for approval. However, Level 3 argues that the question of what to do with the transiting traffic agreement should not preclude the Commission's approval of the interconnection agreement and amendment that have been submitted.

SBC Missouri's response confirms that no transiting traffic agreement has been finalized or executed. SBC Missouri, however, goes further than Level 3 and argues that when the transiting traffic agreement is finalized it need not be submitted to the Commission for approval under section 252(e) of the Telecommunications Act. Instead, SBC Missouri contends that the agreement may be filed with the Federal Communications Commission pursuant to Section 211 of the Telecommunications Act as a mere contract between carriers.

As support for its position, SBC Missouri argues that the Telecommunications Act does not require SBC Missouri, or any other carrier, to provide transiting traffic service as a form of interconnection. Therefore, according to SBC Missouri, an agreement regarding transiting traffic does not have to be a part of an interconnection agreement.

On April 26, Staff filed a response to the positions expressed by Level 3 and SBC Missouri. Staff contends that transiting traffic is a vital form of indirect interconnection. According to Staff, any transiting traffic agreement must be submitted to the Commission for approval under Section 252(e) of the act because only agreements submitted and approved under that section may be adopted by other carriers under the provisions of Section 252(i). If SBC Missouri and Level 3 are able to avoid submitting their transiting traffic agreement under 252(e), that agreement will not be available for adoption by other carriers. As a result, Staff argues that the submitted interconnection agreement that does not include transiting traffic provisions would be discriminatory toward other carriers, and on that basis should be rejected.

Discussion

Under Section 252(e) of the Act, any interconnection agreement adopted by negotiation must be submitted to the Commission for approval. That section provides that the Commission may reject a submitted negotiated agreement only if:

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience and necessity; ...

Furthermore, the Act places tight time constraints on the Commission's actions. Section 252(e)(4) requires the Commission to act within 90 days after the agreement is filed. In this case, that means that the Commission must approve or reject the agreement by May 24. If the Commission has not acted by that date, the agreement will be deemed approved.

Staff does not object to any provision of the interconnection agreement that has been submitted to the Commission for approval. Rather, its objections are to the apparent intention of the parties not to submit a separate transiting traffic agreement to this Commission for approval as an amendment to the interconnection agreement. However, it is an uncontested fact that at the moment there is no such transiting traffic agreement. As a result, the Commission cannot order SBC Missouri and Level 3 to file such an agreement before May 24, when the Commission must act on the submitted interconnection agreement. Therefore, the question becomes whether the Commission should approve the submitted interconnection agreement without such a transiting traffic amendment.

There is no reason to believe that an interconnection agreement must include specific provisions for transiting traffic in order to be approved. Presumably a company seeking to interconnect with SBC Missouri could choose not to request the ability to transit traffic in its interconnection agreement and instead establish a direct physical interconnection with every other carrier. In that circumstance, an agreement that did not address transiting traffic clearly would not be discriminatory toward other carriers and would not be against the public interest. Similarly, this agreement, which includes only general terms regarding transiting traffic, cannot be said to be discriminatory toward other carriers. If SBC Missouri and Level 3 choose to do business under those general terms, and those terms are made available to other carriers, there is no unlawful discrimination. Therefore, the mere absence of specific transiting traffic provisions in the submitted SBC Missouri – Level 3 interconnection agreement can not justify the rejection of that agreement.

Indeed, as SBC Missouri points out, in Case No. TK-2005-0114, the Commission approved an interconnection agreement between ALLTEL and SBC Missouri that did not include terms regarding transiting traffic while nonetheless contemplating the passage of such traffic. Staff responds that at the time it recommended that the ALLTEL – SBC Missouri agreement be approved it was not aware that SBC Missouri was contending that transiting traffic arrangements could be included in

separate commercial agreements and not in interconnection agreements. That argument confirms that Staff's concern is with the separate commercial agreement that may be executed in the future, and not with the terms of the interconnection agreement that is now before the Commission.

Staff may be justified in its concern that important terms regarding interconnection will disappear from interconnection agreements that are available for adoption by other carriers and reappear only in separate commercial agreements that are not available for adoption. On-the-other-hand, SBC Missouri makes a strong argument that transiting services do not need to be included in interconnection agreements. Ultimately, that question may be resolved by the FCC. However, for the purposes of this case, since there currently is no transiting traffic commercial agreement to be reviewed, the Commission does not need to address that issue before approving the submitted interconnection agreement.

The Commission will order SBC Missouri and Level 3 to file the transiting traffic commercial agreement with this Commission for approval under Section 252(e) when it is finalized. If at the time they file the completed agreement for approval, SBC Missouri or Level 3 continue to believe that the agreement does not need to be approved under that section, they may reassert that argument and the Commission will address that question at that time.

The Commission concludes that the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a nonparty carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity. The Commission notes that before providing telecommunications services in Missouri, a party shall possess the following: (1) an interconnection agreement approved by the Commission; (2) except for wireless providers, a certificate of service authority from the Commission to provide interexchange or basic local telecommunications services; and (3) except for wireless providers, a tariff approved by the Commission. The Commission finds that approval of the agreement should be conditioned upon the parties submitting any modifications or amendments to the Commission for approval pursuant to the procedure set out below.

Modification Procedure

The Commission has a duty to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act.² In order for the Commission's role of review and approval to be effective, the Commission must also review and approve or recognize modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection.³ This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission.⁴

² 47 U.S.C. § 252.

³ 47 U.S.C. § 252(h).

⁴ 4 CSR 240 3.545.

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval or recognition, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

Modifications to an agreement must be submitted to the Staff for review. When approved or recognized, the modified pages will be substituted in the agreement, which should contain the number of the page being replaced in the lower right hand corner. Staff will date-stamp the pages when they are inserted into the agreement. The official record of the original agreement and all the modifications made will be maintained in the Commission's Data Center.

The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the Commission will take notice of the modification once Staff has verified that the provision is an approved provision and has prepared a recommendation. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

IT IS THEREFORE ORDERED:

1. That the interconnection agreement and superseding amendment between Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri and Level 3 Communications, LLC, filed on February 23, 2005, are approved.
2. That any changes or modifications to this agreement shall be filed with the Commission pursuant to the procedure outlined in this order.
3. That when Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri and Level 3 Communications, LLC finalize a transiting traffic commercial agreement, they shall file it with this Commission for approval under Section 252(e) of the Telecommunications Act as an amendment to the interconnection agreement.
4. That this order shall become effective on May 13, 2005.

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., concurs with concurrence to follow

Woodruff, Senior Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to approve the comprehensive interconnection agreement (“ICA”) submitted by Level 3 Communications, LLC (“Level 3”) and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (“SBC Missouri”) that was the result of extensive and lengthy negotiations between these companies. This is substantially the same agreement that apparently has been approved by at least eight other state commissions. I voted in favor of this order because I wholeheartedly agree with the Commission’s conclusion that:

“the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a non-party carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity.”

I am writing this concurrence, however, because I disagree with both the Commission’s rationale and decision that requires Level 3 and SBC Missouri to file a transiting traffic commercial agreement for approval under § 252(3) if and when it is finalized – or provide the Commission with legal justification for not filing the agreement.

In the pleadings and responses submitted in this case, the parties have verified that they have reached an agreement in principle as to transit traffic that will be sent over SBC Missouri’s facilities.¹ This agreement, however, has not been reduced to writing and is not included in the ICA at issue in this order. Staff ardently argued that transiting traffic is a “vital form of indirect interconnection”; that allowing SBC Missouri and Level 3 to forego filing this separate commercial agreement would prejudice other carriers because they would not be able to adopt its terms; and that the entire ICA should be found to be discriminatory because the parties did not include transiting traffic terms. Staff also asserted in its Response to SBC Missouri’s Response to Staff’s Recommendations that because it has been an industry practice to include transiting traffic terms in ICAs, the Commission should find that it is a required element of any interconnection agreement until such time as the Federal Communications Commission (“FCC”) issues some order or statement to the contrary. Nowhere in Staff’s pleadings have they pointed to a specific provision of the 1996 Telecommunications Act (“the Act”) or any of the FCC’s rules thereunder that require the provisioning of transiting traffic services. The argument that “it’s the way we’ve always done it” does not amount to legal precedent that requires the continuation of this practice.

Section 251(a) of the Act requires all telecommunications carriers “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” This does not mean that every indirect transmittal of traffic is going to constitute an “interconnection”. The duty to interconnect that is intended by this language is the duty to terminate traffic that is indirectly provided from another carrier

¹ Transiting traffic is a service that allows Level 3 to deliver traffic originating on its network to SBC Missouri, who then sends the traffic to a third-party carrier where the call terminates.

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upon request. In other words, the duty is to open up the terminating carrier's network to allow other carriers to connect with its subscribers. Acting as a third-party carrier between the originating carrier and the terminating carrier should not trigger the duties of interconnection pursuant to § 251(a), as this does not require the third-party carrier to open its network for terminating traffic. The FCC has never held that anything in its rules or the Act requires the provision of transit services as a duty of interconnection under § 251. The duty of ILECs to provide interconnection, therefore, is limited to providing interconnection with the ILECs' networks for terminating traffic, not with the other carriers' networks as an intermediary.

Both staff and SBC Missouri have pointed out that in a recent proposed rulemaking the FCC noted that it "has not had occasion to determine whether carriers have a duty to provide transit service" under the Act and has asked for comment on this and other questions related to transit service.² At least one federal district court has reached the same conclusion.³ Given the FCC's own questioning of the legal basis for requiring ILECs to provide transit service, this Commission did not need to reach the conclusion that an agreement to provide these services, negotiated under private commercial standards, needs to be filed with the Commission for approval or further litigated to determine the need for filing.

It is my opinion that by requiring this issue to remain under scrutiny with the possible outcome that it be filed with the Commission and thereafter available for adoption by all CLECs could have an adverse impact on SBC Missouri's, and for that matter any other ILECs' willingness to negotiate a private, commercial agreement for transiting traffic. This is true for any use of ILEC facilities that is not required under the Act or the FCC's rules. The provisioning of services and elements not otherwise required under the Act should be left to private negotiations between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties subject to the negotiation.

There are provisions under § 211 of the Act for carriers to file contracts with the FCC that are not interconnection agreements subject to state review. SBC Missouri has asserted its intention to file any future transiting traffic agreements with the FCC pursuant to this provision. No other review is necessary.

True competition between ILECs and CLECs will never occur until regulators allow market influences to come to bear on these entities. The 1996 Telecommunications Act was never meant to allow CLECs to ride on the backs of the ILECs' networks for eternity; rather, it was meant to open the market to competitors by

² *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, released March 3, 2005, ¶ 120. While the FCC confirmed that "indirect interconnection" is "a form of interconnection explicitly recognized and supported by the Act" (¶ 125), the FCC has never found that incumbent carriers are required by law to provide transiting traffic service in order to facilitate such indirect interconnection.

³ See *Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle, Robert B. Nelson and David Svanda, Commissioners of the Michigan Public Service Commission*, 222 F.Supp.2d 905, 917-918 (E.D. Mich. 2002), wherein the District Court found that the Michigan Public Service Commission had authority under state law to require transiting traffic services in an interconnection agreement because the FCC had not found this to be a requirement under the Act or its rules.

providing them with access until they could establish their own network facilities. As the last nine years have shown, the CLECs will not take all of the necessary steps to be independent of the ILECs until state and federal regulators stop imposing requirements where none are needed.

In the Matter of the Proposed Merger of Verizon Communications, Inc. and MCI, Inc.

*Case No. TM-2005-0370
Decided May 3, 2005*

Evidence, Practice and Procedure §2. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.

Public Utilities §7. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.

Telecommunications §7. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.

Telecommunications §36. The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.

ORDER CLOSING CASE

Syllabus: The Commission finds that it has no jurisdiction over a merger between Verizon Communications, Inc. and MCI, Inc. In light of its lack of jurisdiction, the Commission rejects a request by the Office of the Public Counsel to conduct an investigation into the transaction.

On April 15, 2005, the Office of the Public Counsel filed a document entitled "Comments of the Office of the Public Counsel." Public Counsel asks the Commission to "conduct an investigation, including evidentiary hearings and public hearings, into the proposed merger of Verizon Communications, Inc. and MCI, Inc." Although Public Counsel does allege that the Commission has authority to approve or disapprove the merger, the relief it requests is for the Commission to investigate the merger and convey the results of that investigation to the Federal Communications Commission and the Department of Justice.

The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level, and it will adhere to that

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position here. Thus the only question is whether the Commission, despite its lack of direct authority over the transaction, should nonetheless conduct an investigation of its possible effects. Public Counsel has not alleged that those entities that do have jurisdiction over the transaction will be lax in their oversight, and the Commission has no reason to believe they will be. The Commission concludes that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise. The Commission will not conduct an investigation into the proposed transaction, and will close this case.

IT IS THEREFORE ORDERED:

1. That this case is closed.
2. That all motions not previously ruled upon are denied.
3. That this order shall become effective on May 3, 2005.

Davis, Chm., and Appling, CC., concur
Murray, C., concurs with concurring opinion attached
Gaw and Clayton, CC., dissent with dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order today, the Commission, by a simple majority, voted to close the case before them finding that it did not have jurisdiction to oversee the merger of the parent companies, Verizon Communications, Inc., and MCI, Inc. that are not subject to Commission oversight. The Commission also found that an investigation was duplicative and unnecessary in light of the fact that the Commission did not find, and the Public Counsel failed to allege that the entities which do have jurisdiction over the transaction will be lax in their oversight.¹

While I voted in favor of the order closing the case, I believe the Commission should have addressed the Office of Public Counsel's allegation that the Commission had jurisdiction under section 386.330.1, RSMo 2000, to conduct a formal investigation into the merger of the parent companies and its effect on Missouri consumers. By failing to address this claim in a direct manner, the Commission has left open the question of its authority under this section. The inference now is that the Commission can open investigations under section 386.330.1, RSMo without concern for the threshold requirements established by law, whenever it questions the vigilance of the Federal Communications Commission ("FCC").

In paragraph 7 of its pleading, the Public Counsel stated, "the Commission under its general authority to conduct investigations in Section 386.330.1, RSMo should open a case to conduct an investigation into the impact the merger has on

¹ The federal agencies with jurisdiction to review the merger between the parent companies are the Federal Communications Commission and the Department of Justice.

the telecommunications market, the ratepayers, and the public interest." The Public Counsel later makes several allegations that an investigation is needed to study the impact of the merger of the parent companies on the competitive markets of the Missouri-certified subsidiary companies.²

Section 386.330.1, RSMo provides as follows:

"The commission may, of its own motion, investigate or make inquiry, in a manner determined by it, as to any act or thing done or omitted to be done by any telecommunications company *subject to its jurisdiction*, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation *in violation of any provision of law or in violation of any order or decision of the commission.*"

(emphasis added).

The Public Counsel did not assert that Verizon Communications, Inc. or MCI, Inc., the parent companies involved in the merger, are "subject to [the commission's] jurisdiction" under section 386.330.1, RSMo. Indeed, such an assertion would fail as there is nothing in the Commission's authorizing statutes that confers jurisdiction to investigate two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.³ Nor does the public counsel allege that the Missouri-regulated subsidiaries of these companies have done or omitted doing an act that is "in violation of any provision of law or in violation of any order or decision of the commission". Without such allegations or independent Commission findings that the Missouri-regulated subsidiaries have violated the law or a Commission order, I believe the Commission has no choice but to dismiss the Public Counsel's request for a hearing pursuant to section 386.330.1, RSMo for lack of jurisdiction.⁴

Despite having reached this conclusion regarding the Public Counsel's request for a formal investigation, I see no reason why the Commission's staff could not review the available information and discuss the impact of the merger on the Missouri-regulated subsidiaries. The staff could then provide a recommendation to the Commission regarding any necessary comments to be forwarded to the

² See Comments of the Office of the Public Counsel, pp. 2-5.

³ See, e.g., *In the Matter of the Merger of SBC Communications Inc. and Ameritech Corporation*, 7 Mo. P.S.C.3d 528 (1998), for an analogous finding regarding the Commission's authority to oversee mergers of parent companies not regulated in Missouri.

⁴ I would note that even if we had jurisdiction to open an investigation under section 386.330.1, RSMo, the timing of the Public Counsel's request would make this a near impossibility. The FCC issued a Public Notice on March 24, 2005, requesting comments from interested parties regarding the merger and setting May 9, 2005 as the deadline for such filings. (See Public Notice in WC Docket No. 05-75). The Public Counsel waited until April 15, 2005 to file its pleading before the Commission requesting an investigation – leaving the Commission little more than three weeks to open a formal investigation into an extremely complex corporate merger in order to file comments with the FCC.

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FCC and the Department of Justice. Our staff routinely handles matters before the FCC in this way without the expense and time-consuming prospect of opening a formal investigation. It is my opinion that we should continue to handle issues within the FCC's jurisdiction in this same manner.

**DISSENTING OPINION OF COMMISSIONERS STEVE GAW
AND ROBERT M. CLAYTON III**

We respectfully dissent from the Order Closing Case issued by the majority in the above captioned proceeding. Through its Comments which initiated this docket, Public Counsel merely requests that the Commission undertake an investigation for the purpose of submitting "well-founded and informed recommendations" in the context of the reviews conducted by the Department of Justice and Federal Communications Commission.¹ As Public Counsel notes, the Commission should evaluate "the effect of the transaction on the Missouri telecommunications industry and marketplace, both local and interexchange."²

In its Order Closing Case, the majority misconstrues the intent of OPC's request. Despite its explicit recognition that "Public Counsel does not allege that the Commission has authority to approve or disapprove the merger", the majority nonetheless devotes the vast majority of its Order to a discussion regarding the Commission's lack of jurisdiction over a parent company transaction. In passing, the majority finds that Public Counsel has not alleged that the FCC and DOJ "will be lax in their oversight, and the Commission has no reason to believe they will be."³ As such, the majority concludes "that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise."⁴

The Commission's position that such an investigation "would be redundant and duplicative" and, therefore, "a fruitless exercise", stands in stark contrast to its actions following the announcement of the SBC / Ameritech merger. Recognizing the obvious effect that the SBC / Ameritech merger would have on Missouri ratepayers, the Commission initiated a docket and held an on-the-record conference so that parties could "address what they believe[d] should be contained in the Commission's comments to the FCC regarding [the] merger."⁵ The Commission conducted this on-the-record conference despite SBC / Ameritech's claims that the Commission lacked jurisdiction to approve the transaction.

In addition to the SBC / Ameritech merger review, the Commission has routinely opened dockets or conducted investigations for the purpose of presenting

¹ *Comments of the Office of the Public Counsel*, Case No. TM-2005-0370, filed April 15, 2005, at page 5.

² *Id.* at 1.

³ *Order Closing Case*, Case No. TM-2005-0355, issued April 19, 2005.

⁴ *Id.*

well-informed comments and information to other agencies or the Missouri General Assembly. For instance, in February of 2004, the Commission issued an Order Establishing Case in Case No. TW-2004-0324 based upon an indication that the Federal Communications Commission would “soon issue a Notice of Proposed Rulemaking concerning Voice over Internet Protocol (VoIP) technology.”⁶ Immediately prior to the Commission issuing its Order Establishing Case, the U.S. District Court for the District of Minnesota issued a decision which held that VoIP “is an information service and therefore not subject to state regulation”.⁷ Despite the apparent lack of Missouri Commission jurisdiction, the Commission nonetheless found that the FCC rulemaking “will have an impact on telecommunications service in Missouri” and that a docket should be established under the Commission’s general supervisory powers (Section 386.250) to “further [the Commission’s] knowledge of VoIP technology and to assist in its preparation of comments to the FCC.”⁸

Additionally, the Commission initiated a docket to study the issue of electric restructuring. In its Order Establishing Docket and Creating Task Force, the Commission notes:

Any decision to implement electric retail competition statewide in Missouri, not merely on an experimental basis, will require amendments to existing state law. While that policy decision must be made by the General Assembly and the Governor, the time has come for the Commission to establish a formal means to identify the risks and benefits that would face the State of Missouri in the event that retail competition occurs.⁹

Despite its recognition that it lacked any authority to unilaterally implement any suggested changes, the Commission established the restructuring docket in order to “compile a comprehensive plan for implementation of retail electric competition in the State of Missouri in the event legislation is enacted which authorizes it.”¹⁰

Without conceding any issue regarding Commission jurisdiction to review the proposed transaction, it seems apparent that the Commission should follow past precedent and conduct an investigation in order to more fully enlighten itself regarding the state of competition in the local and interexchange market and the degree to which competition in those markets will be impacted by Verizon’s acquisition of MCI. The mere establishment of such a docket would not contain an

⁵ *Order Setting Oral Argument*, Case No. TM-99-76, issued September 8, 1998

⁶ *Order Establishing Case*, Case No. TW-2004-0324, issued February 3, 2004.

⁷ *Id.*

⁸ *Id.*

⁹ *Order Establishing Docket and Creating Task Force*, Case No. EW-97-245, issued March 28, 1997.

¹⁰ *Id.*

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implicit finding that the FCC or DOJ would be "lax in their oversight", but instead would be a logical step in anticipation of filing comments as routinely requested by those agencies.

Because of its proximity to consumers in Missouri and its duties under the state and federal telecommunications statutes to examine the status of competition, this Commission has the ability to add valuable information and insight into the impact of this merger on Missouri consumers. Moreover, the Commission should be mindful of the apparent demise of interexchange service as a result of the pending acquisitions of both AT&T and MCI.¹¹ Finally, the Missouri Commission has a responsibility to gather this information and to provide it, with critical analysis, to key elected policy makers. As the Missouri General Assembly prepares to modify state telecommunications laws and as Missouri's Congressional delegation contemplates re-writing the Telecommunications Act of 1996, this Commission owes them the Missouri-specific data retrieved and compiled by Commission staff to protect Missouri consumers.

¹¹ See, Case No. TM-2005-0355 concerning the proposed acquisition of AT&T by SBC.

**Manager of the Manufactured Housing and Modular Units
Program of the Public Service Commission, Complainant, v.
Amea Sales, Inc., d/b/a Columbia Discount Homes, Re-
spondent.**

*Case No. MC-2005-0145
Decided May 3, 2005*

Manufactured Housing § 17. Improper set-up and alteration of a manufactured home could result in the Commission revoking a dealer's registration. Because, however, the dealer compensated the buyers for their damage, the Commission ordered the dealer on probation for two years.

**ORDER APPROVING STIPULATED
AGREEMENT AND CLOSING CASE**

Syllabus: This order approves the Stipulated Agreement between the Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission and Amea Sales, Inc., d/b/a Columbia Discount Homes, and closes the case.

Procedural History

On November 29, 2004, the Manager filed a complaint. The Manager claimed that Columbia Discount improperly set up and improperly altered a manufactured home it sold to James and Dana Palmer. Because of those problems to the Palmer home, the Manager asked the Commission to revoke Columbia Discount's dealer registration, and to allow the Manager to seek civil penalties. Columbia Discount denied the Manager's allegations.

Unanimous Stipulation and Agreement

On April 15, the parties filed a Joint Motion for Commission Approval of Stipulated Agreement. In the Stipulated Agreement, the Manager and Columbia Discount agree that:

- 1) The Manager agrees to move to dismiss this case;
- 2) Columbia Discount agrees to pay a \$2,000 penalty, payable to the public school fund of the state, within 10 days of the Commission's approval of the agreement;
- 3) Columbia Discount's dealer's registration will be on probation for 2 years beginning April 15, 2005, with the probation to include Columbia Discount's giving monthly customer lists to the Manager, the Manager's ability to randomly select homes from that list for inspection, and an automatic one-year revocation of Columbia Discount's dealer registration upon Columbia Discount's failure to repair homes that the Manager finds deficient during those random inspections;

4) Columbia Discount will pay James and Dana Palmer \$50,000 for their damages due to the set-up deficiencies and alteration mentioned in the Manager's complaint;

5) Columbia Discount will pay the inspection costs the Manager incurs to monitor Columbia Discount during the 2-year probation.

Section 536.060, RSMo Supp. 2000, and Commission Rule 4 CSR 240-2.115(1) state that the Commission may accept a stipulation and agreement to resolve this case. In light of Columbia Discount's willingness to pay for the Manager to closely monitor it for the next 2 years, its willingness to allow the Commission to revoke its dealer's registration for 1 year if it does not fix any deficiencies the Manager finds during those 2 years, and its willingness to pay a substantial amount of money to the Palmer's and to the state's public school fund, the Commission finds the Stipulated Agreement reasonable. Therefore, the Commission will approve the Stipulated Agreement and close this case.

IT IS THEREFORE ORDERED:

1. That the Joint Motion for Commission Approval of Stipulated Agreement is granted.
2. That the Stipulated Agreement the parties filed on April 15, 2005, is approved.
3. That the parties shall comply with the terms of the Stipulated Agreement.
4. That this order shall become effective on May 13, 2005.
5. That this case may be closed on May 14, 2005.

Davis, Chm., Murray and Appling, CC., concur
Gaw, C., dissents with opinion to follow
Clayton, C., dissents with dissenting opinion to follow
Pridgin, Regulatory Law Judge

Editor's note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

Dissenting Opinion of Commissioner Steve Gaw

By its Order in the above-captioned docket, the Commission approved a Stipulated Agreement which provides for a resolution to this proceeding. I appreciate the fact that the consumers have expressed satisfaction with the resolution of this matter with a \$50,000 damages payment for the Palmer family. However, I do not believe that this Stipulation does enough to address the continuing complaints about the dealership practices of lots under Amega Sales, Inc. ("Amega"). As such, I respectfully dissent.

Although the Stipulation in this matter provided that Columbia Discount Homes would be placed on probation for two years, it was limited solely to that specific dealer lot (Columbia Discount Homes) and did not extend to the additional lot locations operated by the same corporate entity (Amega). Columbia Discount Homes is a fictitious name used by Amega at Amega's Columbia, Missouri location. Amega has been before this Commission recently where the PSC found

that Amega had violated §§700.100(4) and 700.045. Prior to a Commission determination regarding an appropriate punishment for those violations, a writ of prohibition was issued by the Cole County Circuit Court. In its writ, the Court determined that the Commission was barred from further consideration of this matter. That Circuit Court decision is now on appeal.¹ In addition, Amega has also been sued by the Missouri Attorney General in Boone County in a multiple count petition alleging numerous violations of Missouri's Merchandising Practices Law. One of the prayers for relief in that case is the revocation of Amega's dealer registration. Allegations are not determinations of wrongdoing. However, the multitude of allegations should warrant intensified scrutiny of this company. Yet the Stipulation in this case limits the repercussions to the Columbia location and protects the remainder of Amega.

Amega, not the Columbia Discount Homes location, is the responsible party in this case. What would happen if Columbia Discount's registration is revoked in the future? Could Amega simply change the location's name at the site of Columbia Discount and continue to operate? Could Amega get a new dealer's license in another name and operate it at the same location? If this Commission cannot control the outcome under those scenarios then placing Columbia Discount on probation is meaningless. If so, that leaves the only penalty in this case an arguably small \$2000 fine.

The restriction on the Commission doing more than provided in the Stipulation may have been due in part to an interpretation by the Manufactured Housing and Modular Units Division. Evidently, the Director has interpreted Section 700.090.3 as requiring a separate dealer registration for each separate lot location. While this might enhance the revenues of the Manufactured Housing division, it hamstring this Commission in addressing multiple complaints against one corporation or one entity operating multiple lots under multiple registrations.

Section 700.010(4) defines a "Dealer" as "any person, other than a manufacturer, who sells or offers for sale four or more manufactured homes, or modular units in any consecutive twelve-month period". (Emphasis added). Section 700.010(9) then defines a "Person" as "an individual, partnership, corporation or other legal entity".

As provided by these statutory definitions, the dealer is the individual, partnership, corporation or other legal entity which sells, or offers for sale, manufactured homes at those lot locations.

Section 700.090.3 provides that:

The commission shall issue a certificate of registration to a dealer who: (1) Completes and files with the commission an application for registration which contains the following information: (a) The name of the dealer; (b) The business address of the dealer and addresses of each separate facility owned and operated by the dealer from which manufactured homes or modular units are offered for sale if different from the business address of the dealer.

¹ Western District Court of Appeals Case No. WD64880.

This statute contemplates a dealer having separate facilities. However, Staff has either encouraged or required separate locations to have separate dealer registrations. Such an interpretation seems contrary to the intent of the law. Furthermore, it restricts the Commission's ability to effectively stop bad conduct by a company operating in multiple locations.

In order to avoid this problem going forward and in order to allow the Commission to take action against each lot location of the corporate entity, I maintain that the Director should consider granting only one dealer certificate to a legal entity and require that the legal entity disclose each lot location. In this way, in the event of subsequent regulatory problems, the Commission may take action against that legal entity in a way which will be effective in all underlying lot locations.

**DISSENTING OPINION OF COMMISSIONERS
ROBERT M. CLAYTON III AND STEVE GAW**

These Commissioners respectfully dissent from the majority Report and Order approving a proposed Stipulation and Agreement among Staff and the company. While the alleged victims appear to have received some restitution and a redress of their grievances against the company, these Commissioners are concerned that this settlement does not go far enough to deter inappropriate behavior in the manufactured housing industry.

The Stipulation fails to adequately address the future consequences if this company or any of its affiliates, violate the terms of the agreement or commit new violations. Allegedly, this dealer operates various businesses under several different permits in Missouri. In the event an affiliate violates similar statutory or regulatory provisions, the Commission cannot revoke the benefits of the bargain enjoyed by the respondent. These Commissioners believe that a tighter form of "probation" would encourage appropriate behavior not just by the respondent in the case, but by all related affiliates doing business in this state. The Commission and the Director of the Manufactured Housing Program should be more aggressive in demanding language in the Stipulation which permits a more speedy resolution of complaints and the prompt administration of consequences against the accused dealer.

In addition, the Director should evaluate its interpretation of section 700.090(3)(b), RSMo Cum. Supp. 2005, under which the Director evidently believes dealers must have multiple permits for multiple business locations. This interpretation appears contrary to the statute. The licensing of dealers should be done in the most efficient manner. A single license or permit also allows for more effective enforcement of state law in resolving complaints.

This Commission should instruct the Director to follow the statute and issue one dealer's license for multiple locations. If necessary, the Commission should propose and pursue modifications of state statutes and regulations giving the Director the power and all of the tools necessary to protect consumers from dishonorable manufactured housing dealers and installers.

For the foregoing reasons, these Commissioners dissent.

**In the Matter of an Investigation into Compliance with the
Required Registration of Sellers of Electricity and Gas for
Use or Consumption within Missouri.**

*Case No. GO-2004-0195
Decided May 3, 2005*

Certificates §1, Electric §§1, 13, Gas §§1, 17. The Commission established this case to investigate the sale or distribution of gas and electric energy by companies not certificated by the Commission. In the Order Closing Case, the Commission determined that there were no noncertificated entities selling energy in Missouri.

ORDER CLOSING CASE

Background

On October 24, 2003, the Staff of the Missouri Public Service Commission filed a motion requesting that the Commission open a case to investigate the sale or distribution of gas and electricity in Missouri by entities that are not certificated by the Commission. Staff's motion was prompted by an inquiry from school officials in Salem, Missouri concerning Cornerstone Energy. Cornerstone is not registered with the Commission to sell energy. Finding it reasonable, the Commission granted Staff's motion.

Staff's Investigation

After investigating a number of companies, Staff found that certification of "upstream" transactions is not required and that "downstream" passage of title is not occurring. Staff therefore concluded that its concerns, regarding the selling of energy by companies that are not certificated by the Commission, are moot. However, Staff offered the following recommendations:

- (1) The Commission's website should be updated to include a list of registered Energy Sellers along with clear statements on the scope of the existing Energy Seller's review process.
- (2) If the Commission desires to consider a more level tax paying field, amended legislation should be considered to allow the gross receipts based franchise tax to be replaced by a consumption tax on the end-use customer. The Staff is neither advocating nor opposing a new tax but merely suggesting a possible alternative in the event these taxes are restructured. If new legislation is proposed it should also require the Local Distribution Company to perform the role of tax collector.

- (3) The Commission should consider the effect of limited marketer participation in this state.

In addition to its general finding, Staff submitted answers to several questions posed by the Commission. The questions and answers are as follows:

- a. *What sellers are providing "energy services" as defined by Section 393.297-.302, RSMo 2000?*

None. Staff's interpretation of the law is that energy services are related to a specific service that is delivered to the end-user's premise and that the rule implies control or direct use of the LDC's distribution system by the seller. There are no such sellers in Missouri.

- b. *Of these sellers providing "energy service," which ones are operating without the required certification from the Commission?*

None.

- c. *Are any of these sellers affiliated with electric and gas distributors in Missouri?*

No, because there are no "sellers."

- d. *Are these sellers registered with the Missouri Secretary of State to do business in Missouri?*

Because there are no sellers, there are none registered with the Missouri Secretary of State.

- e. *Should the Commission's certification process be modified to address the financial, technical, and managerial capabilities of sellers providing service in Missouri?*

Staff does not believe Missouri's certification process should be modified. The present practice of limiting the review to an assessment of whether the applicant will collect any taxes that might be due is consistent with the limited requirements of the statute and Commission rule. However, Staff does suggest that the Commission conduct a more detailed review of marketers' creditworthiness and supply capabilities if access to transportation were to be expanded to small commercial or residential customers because those customers often do not have the expertise to contract for natural gas supply and transportation services.

- f. *What plan of action do the parties in this case recommend to ensure full compliance with the statutes by all energy sellers?*

To permit quick access for the public as to which companies are certificated, Staff suggests that a list of certified marketing companies be made available on the Commission's website.

Conclusion

The Commission has reviewed Staff's Report and finds that this case has accomplished its goal of determining whether there are entities selling energy in Missouri without authorization from the Commission. There are none. The Commission will address Staff's recommendations outside the scope of this case. Therefore, this case may now be closed.

IT IS THEREFORE ORDERED:

1. That this order shall become effective on May 13, 2005.

2. That this case may be closed on May 14, 2005.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Jones, Regulatory Law Judge

In the Matter of an Interconnection Agreement between Southwestern Bell Telephone, L.P. and Sage Telecom, Inc.

*Case No. TO-2005-0287
Decided May 5, 2005*

Public Utilities §7. Pursuant to The Telecommunications Act of 1996 and the Commission's own rules, the Commission has a duty to review all resale and interconnection agreements to determine if the agreement is in the public interest.

Telecommunications §7. Pursuant to The Telecommunications Act of 1996 and the Commission's own rules, the Commission has a duty to review all resale and interconnection agreements to determine if the agreement is in the public interest.

Telecommunications §46. The Commission approved and found the Interconnection Agreement between Southwestern Bell Telephone, L.P. and Sage Telecom, Inc., as well as the unanimous Stipulation and Agreement, which was not objected to, to both be in the public interest.

**ORDER APPROVING INTERCONNECTION AGREEMENT
AND ORDER APPROVING STIPULATION AND AGREEMENT**

Syllabus: This order finds that the "Amendment Superseding Certain 251/252 Matters to Interconnection Agreements Under Section 251 and 252 of the Telecommunications Act of 1996" and the "Private Commercial Agreement for Local Wholesale Complete", which together constitute an Interconnection Agreement, filed by Southwestern Bell Telephone, L.P. and Sage Telecom, Inc., subject to a Stipulation and Agreement, is not discriminatory or against the public interest and should be approved. This order also approves the Stipulation and Agreement between the parties and directs the parties to comply with its terms.

Background

In consolidated cases, Case Nos. TO-2004-0576 and TO-2004-0584, Southwestern Bell Telephone, L.P. and Sage Telecom, Inc., submitted for Commission approval an Amendment to their Interconnection Agreement but did not submit a private agreement called the Private Commercial Agreement for Local Wholesale Complete Agreement (LWC). Having found that the amendment and the LWC

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comprise one agreement, the Commission concluded “that it is – by definition – against the public interest to approve one part of an interconnection agreement without considering all parts of that agreement together as whole.” The Commission therefore rejected the amendment. In response to the Commission’s order, SBC and Sage submitted both the amendment and the LWC to the Commission. The Staff of the Commission then moved the Commission to open this case to review the Interconnection Agreement, which is comprised of the amendment and the LWC.

Because this matter is the successor to the consolidated cases, the Commission invited those telecommunications companies that requested intervention in that case to intervene in this one. NuVox Communications of Missouri, Inc., requested, and was granted, intervention. A prehearing conference was held and the parties filed a Stipulation and Agreement on April 13, 2005.

The Stipulation and Agreement

The parties jointly proposed the following two issues:

- (1) Is the LWC subject to review by the Commission?
- (2) Should the Commission approve only the Amendment or both the Amendment and the LWC?

Rather than request a hearing, the parties agreed to submit briefs on the first issue. The second issue is resolved by the Stipulation and Agreement.

As part of the Stipulation and Agreement, the parties revised two sections of the Amendment and added another.¹ Through these Sections, the parties agreed that if it is determined that the LWC need not have been included with the Amendment, then it would be separated from the Amendment. Further, the parties agreed that the revised Amendment would replace the Amendments filed in the consolidated cases² and initially, in this case. Lastly, the added Section sets forth SBC and Sage’s agreement with the Stipulation and Agreement.

The parties also agreed that if the Commission determines that the LWC is subject to Commission approval and the Commission approves both the Amendment and the LWC, then certain Sections of the LWC would not bind a Competitive Local Exchange Carrier that later adopts the Amendment and the LWC. Generally, these Sections concern the private nature of the LWC and that the document should not be subject to regulatory scrutiny.

The parties further agreed that if it is determined that the LWC need not have been submitted to the Commission then certain Sections of the Amendment will not be applicable to an adopting carrier. The parties agree that the Commission should make the conditions set forth in the Agreement, conditions of approval of the Amendment and the LWC.

¹ The parties amended Sections 2.1.1 and 6.2, and added Section 7.9.

² Case Nos. TO-2004-576 and TO-2004-0584.

Lastly, the parties informed the Commission that the Office of the Public Counsel does not oppose the Stipulation and Agreement.

Discussion

Under 47 U.S.C. Section 252(e) of the Telecommunications Act of 1996, any interconnection agreement adopted by negotiation must be submitted to the Commission for approval. In the consolidated case, TO-2004-0576 and TO-2004-0584, the Commission concluded that the Amendment and the LWC were indivisible and that neither was a stand-alone agreement. Because the Amendment and LWC comprise one interconnection agreement, the Commission may reject the agreement if it finds that it is discriminatory or inconsistent with the public interest, convenience and necessity.

In its brief, on the issue of whether the LWC is subject to Commission review, Staff stated that the interconnection agreement, as modified by the Stipulation and Agreement, does not discriminate against nonparties and that implementation of the agreement would be consistent with the public interest, convenience and necessity. NuVox also stated that subject to the Stipulation and Agreement, the Commission should approve the interconnection agreement. Public Counsel has not filed an objection to the Stipulation and Agreement.

Modification Procedure

The Commission has a duty to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act.³ In order for the Commission's review and approval to be effective, the Commission must also review and approve or recognize modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection.⁴ This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission.⁵

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval or recognition, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

Modifications to an agreement must be submitted to the Staff for review. When approved or recognized, the modified pages will be substituted in the agreement, which should contain the number of the page being replaced in the lower right-hand corner. Staff will date-stamp the pages when they are inserted into the agreement. The official record of the original agreement and all the modifications made will be maintained in the Commission's Data Center.

³ 47 U.S.C. § 252.

⁴ 47 U.S.C. § 252(h).

⁵ 4 CSR 240-3.545.

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The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the Commission will take notice of the modification once Staff has verified that the provision in an approved provision and prepared a recommendation. Where a proposed modification is not contained in another agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

Conclusion

The Commission, under the provisions of Section 252(e)(1) of the Telecommunications Act of 1996,⁶ is required to review negotiated interconnection agreements. It may only reject an agreement if it finds that implementing the agreement would be discriminatory to a nonparty or that it is not consistent with the public interest, convenience and necessity.⁷

Commission rule 4 CSR 240-2.115 (1) states that the parties may file a stipulation and agreement as a proposed resolution to all or any part of a contested case and that the Commission may resolve all or any part of a case based on a stipulation and agreement. Based upon its review of the Amendment and the LWC between Sage and SBC and the Stipulation and Agreement between the parties to this matter, the Commission concludes that, subject to the Stipulation and Agreement, the Agreement is neither discriminatory nor inconsistent with the public interest, convenience and necessity and should be approved. Also, Commission rule 4 CSR 240-2.115(2)(A) states that if no party timely objects to a stipulation and agreement, the Commission may treat it as unanimous. Because Public Counsel does not oppose the Stipulation and Agreement, the Commission will treat it as unanimous.

The Commission notes that prior to providing telecommunications services in Missouri, a party shall possess the following: (1) an interconnection agreement approved by the Commission; (2) except for wireless providers, a certificate of service authority from the Commission to provide interexchange or basic local telecommunications services; and (3) except for wireless providers, a tariff approved by the Commission.

IT IS THEREFORE ORDERED:

1. That the "Amendment Superseding Certain 251/252 Matters to Interconnection Agreements Under Section 251 and 252 of the Telecommunications Act of 1996" and the "Private Commercial Agreement for Local Wholesale Complete", which together constitute an Interconnection Agreement, are approved.

⁶ 47 U.S.C. § 252(e)(1).

⁷ 47 U.S.C. § 252(e)(2)(A).

2. That the approval of the Interconnection Agreement is conditioned on those conditions set out the Stipulation and Agreement.
3. That the Stipulation and Agreement is approved and the parties thereto are directed to comply with its terms.
4. That this order shall become effective on May 11, 2005.
5. That this case may be closed on May 12, 2005.

Davis, Chm., Gaw, and Appling,
CC., concur.
Murray, C., concurs, with separate
concurring opinion to follow.
Clayton, C., dissents.

Jones, Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to approve an Interconnection Agreement between Southwestern Bell Telephone Company, L.P. (SBC Missouri) and Sage Telecom, Inc. (Sage). The Commission found that the Interconnection Agreement consisted of the "Missouri Amendment Superseding Certain 251/252 Matters to Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996" (the Amendment) and the "Private Commercial Agreement for Local Wholesale Complete" (LWC Agreement). While I voted in favor of the Order because it was the result of a stipulation and agreement between the parties, I am writing separately to state my opinion that the LWC Agreement does not fall within the scope of the § 252 filing and review requirements.¹

The necessary provisioning of various network elements under § 251 of the 1996 Telecommunications Act (the Act) has been in dispute since the Act went into effect and the Federal Communications Commission (FCC) began issuing rules and orders to implement the Act. Most recently, a federal district court rejected the FCC's impairment analysis as a basis for requiring the provisioning of certain network elements and vacated the rules requiring ILECs to provide unbundled network switching under § 251.² Following this reversal, the FCC called for carriers

¹ SBC Missouri and Sage have disputed the need to file the LWC Agreement as part of an ICA in Missouri and many of the other states where SBC and Sage intend to operate under the LWC Agreement. See *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, and *In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.*, Case No. TO-2004-0584. The Amendment and the LWC Agreement cover a thirteen-state territory. Many of the commissions in states where these agreements will go, or have already gone into effect reached the same conclusion as this Commission.

² See *United States Telecom Association v. F.C.C.*, 359 F.3d 554 (D.C.Cir. 2004) (USTA II).

to negotiate private commercial agreements while the FCC began work on a remand order.³ The FCC's "Order on Remand," released February 4, 2005, also includes comments encouraging carriers to negotiate private agreements during the transition period.⁴

Because of the need for continuity in light of a rapidly shifting regulatory scheme, and because of the encouragement of the FCC, SBC Missouri and Sage began negotiating an agreement to provide the necessary network elements required pursuant to § 251, as well as an agreement that provided network elements that are not required under the Act. This second agreement provided Sage with network elements that, under existing federal law, SBC Missouri is not required pursuant to § 251 to provide. By requiring the LWC Agreement to be filed and approved as part of an ICA, this Commission now makes mandatory the provisioning of network elements that are not requested pursuant to § 251 and that federal law does not require because SBC Missouri now has an ICA on file that can be adopted by any and all CLECs who are interested. Regulatory policy such as this hinders the development of procompetitive business arrangements.

It is my opinion that requiring private commercial agreements to be filed with the Commission for review under § 252 of the Act, when those agreements do not involve network elements or services required under the Act, will have an adverse impact on carriers' willingness to negotiate such agreements in the future. The provisioning of services and elements not otherwise required under the Act should be left to private give and take between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties.

³ See *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, *Staff's Recommendation to the Commission*, Appendix A (FCC News Release dated March 31, 2004, states: "Today, we sent a letter to telecommunications carriers and trade associations urging them to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market."

⁴ See *Order on Remand*, CC Docket No. 01-338, WC Docket No. 04-313, released February 4, 2005, (for example, review the recommendation for the transition period, ¶ 228).

**In the Matter of a Commission Inquiry into the Metropolitan
Calling Area Plan and Calling Scopes in Missouri.**

Case No. TW-2004-0471

Decided May 16, 2005

Telecommunications §30. In response to the Final Report of the Metropolitan Calling Area Plan Task Force, the Commission opened a rulemaking case and published the proposed rule in the Missouri Register. In this Order, the Commission determined it was appropriate to close this case and continue with its rulemaking case and the five pending calling scope cases discussed in the Order.

**ORDER ACCEPTING TASK FORCE FINAL REPORT
AND CLOSING CASE**

On March 18, 2004, the Commission issued an order establishing a task force or working group to investigate whether, and if so, what type, of changes should be made to the Metropolitan Calling Area Plans and to calling scopes in Missouri in general. The Task Force held its first meeting on June 15, 2004, with numerous meetings held thereafter. On September 29, 2004, the Task Force filed its Final Report. Several members of the MCA Task Force gave a presentation regarding the Final Report during the Commission's October 7, 2004 Agenda session.

The major Recommendations of the Task Force are summarized as follows:

- The Commission should support initiatives to simplify, equalize, and reduce inter-company compensation to make calling plans more economically feasible.
- The Commission should promulgate a rule and implement a process to entertain requests for the establishment of new expanded calling plans, or changes to existing expanded calling plans.
- The Commission should investigate whether additional competitive incentives can be achieved with the establishment of a high-cost, state supported fund to ensure that basic local service rates remain affordable for all Missourians. The state fund should be funded through an end-user surcharge and all funds should be disbursed equitably among high-cost providers without regard to company size or locations served.
- The Commission should account for competitive implications, revenue impacts, company and societal costs of implementing calling plans balanced against the desire for specific actions to address community-of-interest issues.
- The Task Force recommends that certain previously-filed petitions for modification to the MCA be taken up and considered as filed petitions under the process proposed in the Final Report. These petitions include:

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Kansas City MCA

- A proposal to reclassify the Greenwood exchange from MCA 3 (optional) to MCA 2 (mandatory).
- A proposal to add the Lexington exchange to Tier 5 at MCA 5 rates.

Springfield MCA

- A proposal to reclassify the Ozark exchange from MCA 2 (optional) to MCA 1 (mandatory).

St. Louis MCA

- A proposal to establish a new optional Tier 6 to include the following exchanges: Washington, Union, Wright City, St. Clair, Marthasville, Beaufort, Foley, and Warrenton.

Several Task Force members filed responses to the Final Report, including Natelle Dietrich, John Van Eschen and William Voight of the Commission's Staff, Michael J. Pauls of AT&T Communications of the Southwest, Inc., and Craig Unruh of SBC Missouri. These supplemental statements make it clear that not all of the Task Force members believe that the Task Force adequately addressed the Commission's original directives. In addition, not all of the Task Force members agree as to how the previously filed petitions for modification to be MCA should be addressed.

The Commission has reviewed and considered the Task Force's Final Report, along with the comments filed in response to that document. As a result of the Task Force recommendations, the Commission has opened a rulemaking case, Case No. TX-2004-0194, regarding expanded calling scopes. This proposed rule was published in the Missouri Register on April 15, 2005, and a public hearing regarding the proposed rule will be held on May 16, 2005. The Commission is also moving forward with several expanded calling scope cases, including the following:

- TO-2003-0257, In the Matter of the Request from the Customers in the Rockaway Beach Exchange for an Expanded Calling Scope to Make Toll-Free Calls to Branson;
- TO-2005-0141, In the Matter of a Request for Expansion of the St. Louis Metropolitan Calling Area Plan to Include the Exchanges of Washington, Union, Wright City, St. Clair, Marthasville, Beaufort, Foley, and Warrenton;
- TO-2005-0142, In the Matter of a Request for Expansion of the Kansas City Metropolitan Calling Area Plan to Include the Exchange of Lexington as Part of Tier 5;
- TO-2005-0143, In the Matter of a Request for Modification of the Springfield Metropolitan Calling Area Plan to Make the Ozark Exchange a MCA Tier 1 Exchange; and

· TO-2005-0144, In the Matter of a Request for the Modification of the Kansas City Metropolitan Calling Area Plan to Make the Greenwood Exchange Part of the Mandatory MCA Tier 2.

The Commission appreciates the time and effort of the Task Force. The Commission determines that the appropriate course of action at this time is for the Commission to continue with its rulemaking case and the five expanded calling scope cases noted above, and to close this case, TW-2004-0471.

IT IS THEREFORE ORDERED:

1. That Case No. TW-2004-0471 may be closed on May 27, 2005.
2. That this order shall become effective on May 26, 2005.

Vicky Ruth, Senior Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

In the Matter of the Application of Missouri RSA No. 5 Partnership, d/b/a Chariton Valley Wireless for Approval of an Interconnection Agreement with Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri Pursuant to Section 252(e) of the Telecommunications Act of 1996.*

*Case No. TK-2005-0304
Decided May 19, 2005*

Public Utilities §7. The Telecommunications Act of 1996 requires interconnection agreements be filed for approval with the State Commission.

Telecommunications §7. The Telecommunications Act of 1996 requires interconnection agreements be filed for approval with the State Commission.

Telecommunications §9. The Commission found Missouri RSA No. 5 Partnership, d/b/a Chariton Valley Wireless and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri's Interconnection Agreement to be against public interest. The companies entered into a separate agreement for transit traffic, an interconnection service, which was not included in the Interconnection Agreement submitted to the Commission.

AMENDED ORDER REJECTING INTERCONNECTION AGREEMENT

Syllabus: This order rejects the Interconnection Agreement executed by the parties and filed by Missouri RSA No. 5 Partnership, d/b/a Chariton Valley Wireless.

* The Commission, in an order issued on June 9, 2005, denied an application for rehearing in this case.

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Procedural History

On March 15, 2005, Missouri RSA No. 5 Partnership d/b/a Chariton Valley Wireless filed an application with the Missouri Public Service Commission for approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri. The Agreement was filed under Section 252(e)(1) of the Telecommunications Act of 1996.¹ The Agreement would permit Chariton to interconnect its facilities with SBC. SBC holds a certificate of service authority to provide basic local exchange telecommunications services in Missouri.

Although SBC is a party to the Agreement it did not joint in the application. On March 17, 2005, the Commission issued an order making SBC a party in this case and directed that any party wishing to request a hearing do so no later than April 6, 2005. No party requested a hearing.

On April 14, 2005, the Staff of the Commission recommended that the Commission reject the Agreement. Staff stated that it contacted Chariton Valley and confirmed that the parties had entered into a separate agreement for transit traffic and did not intend to submit that agreement to the Commission for approval. Staff argued that transit traffic is an interconnection service and that an interconnection agreement omitting an interconnection service would be discriminatory and against the public interest because other carriers would not be able to adopt the "whole" interconnection agreement. Quoting the Federal Communications Commission, Staff further stated that indirect interconnection is a form of interconnection explicitly recognized and supported by the Telecommunications Act and that the availability of transit service is increasingly critical to establishing indirect interconnection.² Staff suggested that the Commission direct the parties to file the transiting agreement. Staff further suggested that if the parties do not file the transiting agreement then the Commission should reject the interconnection agreement.

Positions of SBC and Chariton

Commission rule 4 CSR 240-2.080(15) requires that parties file responsive pleadings within ten days. No party filed a response to Staff's recommendation. However, the Commission will take official notice of the positions taken by SBC and Chariton in Case No. TK-2005-0300. The issue is identical and the parties are largely the same.

In Case No. TK-2005-0300, SBC argues that it is not obligated to provide transit service under the Telecommunications Act. Based on this premise, SBC argues that it does not have to file the transiting agreement between it and Chariton with the Commission. Although recognizing that the Act requires carriers to indirectly interconnect, SBC argues that the Act does not require carriers to *provide* indirect interconnection.

Chariton stated that it has no objection to filing the transit agreement with the Commission. Chariton further stated that when negotiating the interconnection agreement between it and SBC, SBC notified Chariton that it would not negotiate

¹ 47 U.S.C. §251, et seq.

² *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, released March 3, 2005, at 126.

a transiting agreement unless Chariton agreed that the agreement was not subject to Commission approval. Chariton stated that it disagrees with that position, but complied in order to make transiting services available.

Discussion

As recognized by SBC, the Telecommunication Act requires companies to indirectly interconnect. If companies are required under the Act to indirectly connect, there must be an intermediary through which those companies connect indirectly. If the intermediary is not required under the Act to transit the indirect traffic, then the purpose of the Act would be frustrated.

The Act requires that interconnection agreements be filed for approval with the state commission.³ An interconnection agreement is any agreement, negotiated or arbitrated, that contains terms of interconnection. Transit service falls within the definition of interconnection service.⁴ SBC and Chariton have an agreement covering transit service. Because the transit agreement is an interconnection service, it must be filed with the Commission for approval.

SBC and Chariton have filed an interconnection agreement that does not include provisions for transiting traffic. It is conceivable that an interconnection agreement need not contain transit services. However, in this matter, Chariton intends to use transiting as their method of indirect interconnection but SBC and Chariton have failed to include transiting provisions in the interconnection agreement. This agreement is deficient in that it does not include all of the interconnection terms to which the parties have agreed. The Commission finds that it is against the public interest to approve only part of an interconnection agreement; the whole of which should be before the Commission and, if approved, subject to adoption by other carriers. Having found that it is against the public interest to approve the agreement between SBC and Chariton, the Commission will reject the agreement.

Conclusion

The Commission concludes that transiting traffic is an interconnection service and is therefore subject to Commission approval. The Commission finds that it is against the public interest to approve an interconnection agreement when the parties have also entered into a transit traffic agreement that is not before the Commission. The Commission will therefore reject the interconnection agreement. The Commission, however, will not order SBC and Chariton to file the transiting agreement. SBC and Chariton now know that the Commission will not approve an interconnection agreement when the parties have also entered into, but have not submitted for Commission approval, a transit traffic agreement.

If the parties subsequently file the interconnection agreement and associated transit traffic agreement for Commission approval, that filing will create a new case.

³ 47 U.S.C. §252(e).

⁴ *Connecticut Telcom*, Docket No. 02-01-23, 2003 Conn. PUC Lexis 11 (January 15, 2003).

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IT IS THEREFORE ORDERED:

1. That the Interconnection Agreement between Missouri RSA No. 5 Partnership, d/b/a Chariton Valley Wireless and Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, filed on March 15, 2005, is rejected.

2. That this order shall become effective on May 29, 2005.

3. That this case may be closed on May 30, 2005.

Davis, Chm., Gaw, Clayton, and
Appling, CC., concur.
Murray, C., dissents, with separate
dissenting opinion attached.

Jones, Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to reject the comprehensive interconnection agreement (ICA) filed by Missouri RSA No. 5 Partnership, d/b/a Chariton Valley Wireless (Chariton Wireless) and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (SBC Missouri) that was the result of extensive and lengthy negotiations between these companies and represents the true business arrangements under which these companies wish to do business. The Commission rejects the filed ICA because Chariton Wireless and SBC Missouri did not formally file a separate, privately negotiated transiting traffic agreement.¹ I must dissent from this order because I disagree that the transiting traffic agreement must be filed for Commission approval.

The Commission has approved a very similar ICA in a recent decision in which SBC Missouri and Level 3 Communications had not reached a final agreement on transit traffic provisioning.² While the decision in that case included a requirement that the parties file any transiting traffic agreement that they do finally reach, the Commission found the existing ICA met the requirements of the 1996 Telecommunications Act, stating:

“There is no reason to believe that an interconnection agreement must include specific provisions for transiting

¹ Transiting traffic is a service that allows Chariton Wireless to deliver traffic originating on its network to SBC Missouri, who then sends the traffic to a third-party carrier where the call terminates.

² See *In the Matter of the Application of Level 3 Communications, LLC and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri for Approval of Their Negotiated Interconnection Agreement and Superseding Amendment under Section 252(3)(1) of the Telecommunications Act, Order Approving Interconnection Agreement and Directing Parties to File Their Transiting Traffic Agreement as an Amendment to the Interconnection Agreement*, Case No. TK-2005-0285 (May 13, 2005).

traffic in order to be approved. . . . Therefore, the mere absence of specific transiting traffic provisions in the submitted SBC Missouri – Level 3 interconnection agreement can not justify the rejection of that agreement.

. . . the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a non-party carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity.”³

While the majority felt that a future transiting traffic agreement might alter their view of the filed ICA, they could not fault the terms of the existing ICA under review.

I disagree with the Commission's rejection of a perfectly acceptable interconnection agreement similar to those previously approved, because the parties declined to file a transiting traffic commercial agreement for approval under §252(e).

The majority asserts that transit traffic provisioning is a form of “interconnection service”⁴ and that no interconnection agreement should be approved if it leaves out an interconnection service that is contained in a separate agreement. It reasons that the inability for other carriers to opt into the transiting traffic provisions renders the whole ICA discriminatory. Neither Staff's pleadings nor the Commission's Order point to a specific provision of the 1996 Telecommunications Act (the Act) or any of the FCC's rules thereunder that require the provisioning of transiting traffic services.

Section 251(a) of the Act requires all telecommunications carriers “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” This does not mean that every indirect transmittal of traffic is going to constitute an “interconnection service.” The duty to interconnect that is intended by this language is the duty to terminate traffic that is indirectly provided from another carrier, upon request. In other words, the duty is to open up the terminating carrier's network to allow other carriers to connect with its subscribers. Acting as a third-party carrier between the originating carrier and the terminating carrier should not trigger the duties of interconnection pursuant to § 251(a), as this does not require the third-party carrier to open its network for terminating traffic. The FCC has never held that anything in its rules or the Act requires the provision of transit services as a duty of interconnection under § 251.

Both Staff and SBC Missouri (in other cases before the Commission) have pointed out that in a recent proposed rulemaking the FCC noted that it “has not had

³ *Id.* See also, *In the Matter of the Application of ALLTEL Communications, Inc., for Approval of its Successor Cellular/PCS Interconnection Agreement and Accompanying Amendment with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, Under 47 U.S.C. §252., Order Approving Interconnection Agreement*, Case No. TK-2005-0114.

⁴ It is telling that the only alleged authority cited in the Report and Order for the majority's conclusory statement that transit service falls within the definition of interconnection service is a 2003 Connecticut PUC case.

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occasion to determine whether carriers have a duty to provide transit service" under the Act and has asked for comment on this and other questions related to transit service.⁵ At least one federal district court has reached the same conclusion.⁶ Given the FCC's own questioning of the legal basis for requiring ILECs to provide transit service, this Commission did not need to reach the conclusion that an agreement to provide these services, negotiated under private commercial standards, needs to be filed with the Commission for approval or that the failure to file the transiting traffic provisions renders the existing ICA discriminatory.

It is my opinion that requiring transiting traffic agreements to be filed with the Commission and thereafter available for adoption by all CLECs could have an adverse impact on carriers' willingness to negotiate private, commercial agreements for transiting traffic or for any use of ILEC facilities that is not required under the Act or the FCC's rules. The provisioning of services and elements not otherwise required under the Act should be left to private negotiations between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties subject to the negotiation.

There are provisions under § 211 of the Act for carriers to file contracts with the FCC that are not interconnection agreements subject to state review. SBC Missouri has stated that it publicly files transiting traffic agreements with the FCC pursuant to this provision. No other review is necessary.

⁵ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, *Further Notice of Proposed Rulemaking*, released March 3, 2005, ¶ 120. While the FCC confirmed that "indirect interconnection" is "a form of interconnection explicitly recognized and supported by the Act" (¶ 125), the FCC has never found that incumbent carriers are required by law to provide transiting traffic service in order to facilitate such indirect interconnection.

⁶ See *Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle, Robert B. Nelson and David Svanda, Commissioners of the Michigan Public Service Commission*, 222 F.Supp.2d 905, 917-918 (E.D. Mich. 2002), wherein the District Court found that the Michigan Public Service Commission had authority under state law to require transiting traffic services in an interconnection agreement because the FCC had not found this to be a requirement under the Act or its rules. I would note that simply because we could require transiting traffic agreements be filed with the Commission, does not mean we should.

**Application of Chariton Valley Communications Corporation,
Inc., for Approval of an Interconnection Agreement with
Southwestern Bell Telephone, L.P. d/b/a SBC Missouri
pursuant to Section 252(e) of the Telecommunications Act
of 1996.***

Case No. TK-2005-0300

Decided May 19, 2005

Telecommunications § 36. An interconnection agreement is any agreement that has terms of interconnection. Transit service is a form of indirect interconnection. Therefore, if the parties have an agreement covering transit service, that agreement must be filed with the Commission for approval.

Telecommunications § 38. A contract that does not include all of the parties' interconnection terms is deficient. It is against the public interest for the Commission to approve only part of the parties' interconnection agreement. The whole agreement should be before the Commission and, if approved, other carriers may adopt that agreement.

ORDER REJECTING INTERCONNECTION AGREEMENT

Syllabus: This order rejects the Interconnection Agreement executed by the parties and filed by Chariton Valley Communication Corporation, Inc.

Procedural History

On March 9, 2005, CVCI filed an application with the Commission for approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri. The Agreement was filed pursuant to Section 252(e)(1) of the Telecommunications Act of 1996.¹ The Agreement would permit CVCI to interconnect its facilities with SBC Missouri. SBC Missouri holds a certificate of service authority to provide basic local exchange telecommunications services in Missouri.

Although SBC Missouri is a party to the Agreement, it did not join in the application. On March 14, 2005, the Commission issued an order making SBC Missouri a party in this case and directing any party wishing to request a hearing to do so no later than April 4, 2005. No requests for hearing were filed.

On April 13, 2005, the Staff of the Commission recommended that the Commission reject the Agreement. Staff stated that it contacted CVCI and confirmed that the parties had entered into a separate agreement for transit traffic and did not intend to submit that agreement to the Commission for approval. Staff argued that transit traffic is an interconnection service and that an interconnection agreement omitting an interconnection service would be discriminatory and against the public interest because other carriers would not be able to adopt the "whole" interconnection agreement. Quoting the Federal Communications Commission, Staff further stated that indirect interconnection is a form of interconnection explicitly recognized

* The Commission, in an order issued on June 9, 2005, denied an application for rehearing in this case.

¹ See 47 U.S.C. § 251, *et seq.*

and supported by the Telecommunications Act and that the availability of transit service is increasingly critical to establishing indirect interconnection.² Staff suggested that the Commission direct the parties to file the transiting agreement. Staff further suggested that if the parties do not file the transiting agreement then the Commission should reject the interconnection agreement.

Positions of CVCI and SBC

SBC Missouri argues that it is not obligated to provide transit service under the Telecommunications Act. Based on this premise, SBC Missouri argues that it does not have to file the transiting agreement between it and Chariton with the Commission. Although recognizing that the Act requires carriers to indirectly interconnect, SBC Missouri argues that the Act does not require carriers to *provide* indirect interconnection.

CVCI stated that it has no objection to filing the transit agreement with the Commission. CVCI further stated that when negotiating the interconnection agreement between it and SBC Missouri, SBC notified CVCI that it would not negotiate a transiting agreement unless CVCI agreed that the agreement was not subject to Commission approval. CVCI stated that it disagrees with that position, but complied in order to make transiting services available.

Discussion

As recognized by SBC Missouri, the Telecommunications Act requires companies to indirectly interconnect. If companies are required under the Act to indirectly connect, there must be an intermediary through which those companies connect indirectly. If the intermediary is not required under the Act transit the indirect traffic, then the purpose of the Act would be frustrated.

The Act requires that interconnection agreements be filed for approval with the state commission.³ An interconnection agreement is any agreement, negotiated or arbitrated, that contains terms of interconnection. Transit service falls within the definition of interconnection service.⁴ SBC and CVCI have an agreement covering transit service. Because the transit agreement is an interconnection service, it must be filed with the Commission for approval.

SBC and CVCI have filed an interconnection agreement that does not include provisions for transiting traffic. It is conceivable that an interconnection agreement need not contain transit services. However, in this matter, CVCI intends to use transiting as its method of indirect interconnection, but SBC and CVCI have failed to include transiting provisions in the interconnection agreement. This agreement is deficient in that it does not include all of the interconnection terms to which the parties have agreed. The Commission finds that it is against the public interest to approve only part of an interconnection agreement; the whole of which should be before the Commission and, if approved, subject to adoption by other carriers.

² *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, released March 3, 2005, at 126.

³ 47 U.S.C. §252(e).

⁴ *Connecticut Telcom*, Docket No. 02-01-23, 2003 Conn. PUC Lexis 11 (January 15, 2003)

Having found that it is against the public interest to approve the agreement between SBC and CVCI, the Commission will reject the agreement.

Conclusion

The Commission concludes that transit traffic is an interconnection service and is therefore subject to Commission approval. The Commission finds that it is against the public interest to approve an interconnection agreement when the parties have also entered into a transit traffic agreement that is not before the Commission. The Commission will therefore reject the interconnection agreement. The Commission, however, will not order SBC Missouri and CVCI file the transiting agreement. SBC Missouri and CVCI now know that the Commission will not approve an interconnection agreement when the parties have also entered into, but have not submitted for Commission approval, a transit traffic agreement.

If the parties subsequently file the interconnection agreement and associated transit traffic agreement for Commission approval, that filing will create a new case.

IT IS THEREFORE ORDERED:

1. That the Interconnection Agreement between Chariton Valley Communication Corporation, Inc. and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri filed on March 9, 2005, is rejected.
2. That this order shall become effective on May 29, 2005.
3. That this case may be closed on May 30, 2005.

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., dissents, dissenting opinion attached

Pridgin, Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to reject the comprehensive interconnection agreement (ICA) filed by Chariton Valley Communications Corporation, Inc. (Chariton Valley) and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (SBC Missouri) that was the result of extensive and lengthy negotiations between these companies and represents the true business arrangements under which these companies wish to do business. The Commission rejects the filed ICA because Chariton Valley and SBC Missouri did not formally file a separate, privately negotiated transiting traffic agreement.¹ I must dissent from this order because I disagree that the transiting traffic agreement must be filed for Commission approval.

¹ Transiting traffic is a service that allows Chariton Valley to deliver traffic originating on its network to SBC Missouri, who then sends the traffic to a third-party carrier where the call terminates.

The Commission has approved a very similar ICA in a recent decision in which SBC Missouri and Level 3 Communications had not reached a final agreement on transit traffic provisioning.² While the decision in that case included a requirement that the parties file any transiting traffic agreement that they do finally reach, the Commission found the existing ICA met the requirements of the 1996 Telecommunications Act, stating:

"There is no reason to believe that an interconnection agreement must include specific provisions for transiting traffic in order to be approved. . . . Therefore, the mere absence of specific transiting traffic provisions in the submitted SBC Missouri – Level 3 interconnection agreement can not justify the rejection of that agreement.

. . . the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a non-party carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity."³

While the majority felt that a future transiting traffic agreement might alter their view of the filed ICA, they could not fault the terms of the existing ICA under review.

I disagree with the Commission's rejection of a perfectly acceptable interconnection agreement similar to those previously approved, because the parties declined to file a transiting traffic commercial agreement for approval under §252(e).

The majority asserts that transit traffic provisioning is a form of "interconnection service"⁴ and that no interconnection agreement should be approved if it leaves out an interconnection service that is contained in a separate agreement. It reasons that the inability for other carriers to opt into the transiting traffic provisions renders the whole ICA discriminatory. Neither Staff's pleadings nor the Commission's Order point to a specific provision of the 1996 Telecommunications Act (the Act) or any of the FCC's rules thereunder that require the provisioning of transiting traffic services.

² See *In the Matter of the Application of Level 3 Communications, LLC and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri for Approval of Their Negotiated Interconnection Agreement and Superseding Amendment under Section 252(3)(1) of the Telecommunications Act*, Order Approving Interconnection Agreement and Directing Parties to File Their Transiting Traffic Agreement as an Amendment to the Interconnection Agreement, Case No. TK-2005-0285 (May 13, 2005).

³ *Id.* See also, *In the Matter of the Application of ALLTEL Communications, Inc., for Approval of its Successor Cellular/PCS Interconnection Agreement and Accompanying Amendment with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, Under 47 U.S.C. §252.*, Order Approving Interconnection Agreement, Case No. TK-2005-0114.

⁴ It is telling that the only alleged authority cited in the Report and Order for the majority's conclusory statement that transit service falls within the definition of interconnection service is a 2003 Connecticut PUC case.

Section 251(a) of the Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." This does not mean that every indirect transmittal of traffic is going to constitute an "interconnection service." The duty to interconnect that is intended by this language is the duty to terminate traffic that is indirectly provided from another carrier, upon request. In other words, the duty is to open up the terminating carrier's network to allow other carriers to connect with its subscribers. Acting as a third-party carrier between the originating carrier and the terminating carrier should not trigger the duties of interconnection pursuant to § 251(a), as this does not require the third-party carrier to open its network for terminating traffic. The FCC has never held that anything in its rules or the Act requires the provision of transit services as a duty of interconnection under § 251.

Both Staff and SBC Missouri (in other cases before the Commission) have pointed out that in a recent proposed rulemaking the FCC noted that it "has not had occasion to determine whether carriers have a duty to provide transit service" under the Act and has asked for comment on this and other questions related to transit service.⁵ At least one federal district court has reached the same conclusion.⁶ Given the FCC's own questioning of the legal basis for requiring ILECs to provide transit service, this Commission did not need to reach the conclusion that an agreement to provide these services, negotiated under private commercial standards, needs to be filed with the Commission for approval or that the failure to file the transiting traffic provisions renders the existing ICA discriminatory.

It is my opinion that requiring transiting traffic agreements to be filed with the Commission and thereafter available for adoption by all CLECs could have an adverse impact on carriers' willingness to negotiate private, commercial agreements for transiting traffic or for any use of ILEC facilities that is not required under the Act or the FCC's rules. The provisioning of services and elements not otherwise required under the Act should be left to private negotiations between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties subject to the negotiation.

⁵*In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, released March 3, 2005, ¶ 120. While the FCC confirmed that "indirect interconnection" is "a form of interconnection explicitly recognized and supported by the Act" (¶ 125), the FCC has never found that incumbent carriers are required by law to provide transiting traffic service in order to facilitate such indirect interconnection.

⁶*See Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle, Robert B. Nelson and David Svanda, Commissioners of the Michigan Public Service Commission*, 222 F.Supp.2d 905, 917-918 (E.D. Mich. 2002), wherein the District Court found that the Michigan Public Service Commission had authority under state law to require transiting traffic services in an interconnection agreement because the FCC had not found this to be a requirement under the Act or its rules. I would note that simply because we could require transiting traffic agreements be filed with the Commission, does not mean we should.

There are provisions under § 211 of the Act for carriers to file contracts with the FCC that are not interconnection agreements subject to state review. SBC Missouri has shown its compliance with the Act by filing the existing transiting traffic agreement with the FCC pursuant to this provision. No other review is necessary.⁷

In the Matter of the Joint Application of Missouri-American Water Company and Both Osage Water Company and Environmental Utilities, L.L.C. for Authority for Missouri-American Water Company to Acquire the Water and Sewer Utility Assets of Both Entities, and for the Transfer to Missouri-American Water Company of Certificates of Convenience and Necessity to Continue Operation of Such Assets as Water and Sewer Corporations Regulated by the Missouri Public Service Commission.*

Case No. WO-2005-0086

Decided June 9, 2005

Sewer §4. Water §4. The Commission rejected, without a hearing, an application that would have conveyed all of a company's water assets, and some, but not all, of its sewer assets to another utility company, where the distressed selling company, which was already providing poor service to its customers, would have been left to operate a remnant portion of its sewer system.

ORDER DISMISSING JOINT APPLICATION

On October 5, 2004, Missouri-American Water Company, Osage Water Company, and Environmental Utilities, L.L.C. filed a Joint Application seeking the Commission's approval of Missouri-American's plan to purchase all of the assets of Environmental Utilities and some, but not all, of the assets of Osage Water. The proposed sale did not include the Cedar Glen sewer system portion of the assets of Osage Water. At an oral argument held on January 13, 2005, the parties indicated

* The Commission, in an order issued on July 14, 2005, denied a motion for rehearing in this case. The case was appealed to Cole County Circuit Court (05ACCC00709). This case was appealed to Missouri Court of Appeals Western District (WD 66860).

⁷ SBC Missouri submitted as an attachment a copy of the Transit Traffic Service Agreement between it and Chariton Valley as a courtesy to the Commission. See *Response of Southwestern Bell Telephone, L.P. to the Staff's Recommendation*. SBC Missouri asserts that it filed this agreement with the Federal Communications Commission ("FCC") on February 15, 2005.

that if those assets were not sold to Missouri-American, Osage Water would have to continue to operate that portion of its system until a suitable buyer could be found. At that time, however, the applicants indicated that they were negotiating toward including the Cedar Glen sewer system in the proposed transaction.

In response to what it learned at the oral argument, the Commission issued an order on January 25, indicating that it was unwilling to consider the transaction proposed by the applicants so long as it did not include the sale of all of the assets of Osage Water. The Commission requested that the applicants modify their proposal to include the sale of the Cedar Glen sewer system. On March 9, Missouri-American filed a Notice Concerning Cedar Glen Sewer, in which it indicated that it was not willing to purchase the Cedar Glen sewer system and that it would not modify its application.

On May 2, the Staff of the Commission filed a Motion to Reject Transaction and Dismiss Application. Staff pointed out that the Commission indicated that it would not approve the application as submitted because it failed to provide for the transfer of the Cedar Glen sewer system. Staff also pointed out that Missouri-American refused to modify its purchase proposal to acquire the Cedar Glen sewer system. Staff, therefore, urged the Commission to summarily reject the proposed transaction and dismiss the application.

Neither Missouri-American, Osage Water, nor Environmental Utilities have responded to Staff's motion. Indeed, the only party that filed any response to Staff's motion was an intervenor, Hancock Construction. Hancock urged the Commission to grant Staff's motion.

The Commission is not willing to approve any sale transaction that does not dispose of all of Osage Water's operating assets. The transaction proposed by the applicants would require Osage Water to continue to provide sewer service to Cedar Glen until a buyer could be found to purchase and operate that system. That result is not acceptable because Osage Water is unable to safely and effectively operate its current system to the extent that the Commission has filed a petition in the Circuit Court of Camden County to have a receiver appointed to take charge of that company and its water and sewer systems. Any transaction that would sell off only a portion of Osage Water's sewer systems would leave that distressed company to attempt to operate a remnant of its system with dire implications for the service that it would be able to provide to its remaining customers. Such a result cannot be in the public interest.

Since the transaction proposed in the Joint Application cannot be in the public interest, it will be rejected and the Joint Application will be dismissed.

IT IS THEREFORE ORDERED:

1. That Staff's Motion to Reject Transaction and Dismiss Application is granted.
2. That the transaction proposed in the Joint Application filed by Missouri-American Water Company, Osage Water Company, and Environmental Utilities, L.L.C. is rejected.
3. That the Joint Application filed by Missouri-American Water Company, Osage Water Company, and Environmental Utilities, L.L.C. is dismissed.
4. That this order shall become effective on June 19, 2005.

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Davis, Chm., Murray and Appling, CC., concur
Gaw and Clayton, CC., dissent, dissents to follow

Woodruff, Senior Regulatory Law Judge

**Dissenting Opinion of Commissioners Steve Gaw
and Robert M. Clayton, III**

Through its Order Dismissing Joint Application in the above-captioned docket, the Commission has rejected an Application which provided for the sale of all of the utility assets from Osage Water Company, as well as a portion of the assets of Environmental Utilities. As noted in the pleadings and arguments throughout this proceeding, the pending transaction would not, however, provide for the transfer of assets associated with the Cedar Glen sewer system. Rather, Environmental Utilities would continue to exist and operate the Cedar Glen sewer system for some indefinite period of time.

In light of the repeated environmental and regulatory issues associated with these utilities as well as its underlying ownership and management team, the Commission deemed it inappropriate to proceed with any transaction which allowed any semblance of the current utility or management team to remain in existence. The Commission found in its Order that “[a]ny transaction that would sell off only a portion of Osage Water’s sewer systems would leave that distressed company to attempt to operate a remnant of its system with dire implications for the service that it would be able to provide to its remaining customers. Such a result cannot be in the public interest.” We agree with the importance of bringing new management to these utility assets. Other issues have also been raised which would additionally cause concern regarding potential rates and quality of service. We believe, however, that dismissing this case may delay this objective. Allowing the case to remain open could provide some flexibility in working to a favorable resolution for the ratepayers.

Currently, the Commission has a receivership petition pending in Camden County to seize operational control of these utilities. It is unlikely, however, that any resolution can be reached through that proceeding until after the scheduled October 8, 2005 hearing. As such, the immediate sale application represents a viable avenue for a quicker resolution of this matter. Attempting to resolve the issues which would prevent a sale of all assets of the companies could have been discovered in this case.

As a final note we point out that Senate Bill 462 now has been enacted. This legislation provides additional tools which may be applicable to these companies in that it enhances the Commission’s receivership authority and permits the Commission to appoint an interim receiver upon a determination that a current utility is “unable or unwilling to provide safe and adequate service” or “has been actually or effectively abandoned by its owners”. This Commission should examine the applicability of this legislation to the companies here in issue.

In the Matter of Alma Communications Company, doing business as Alma Telephone Company, for Authority and Approval to Issue a Note, Loan Agreement, Mortgage, Security Agreement, and Financing Statement to Borrow Funds from the Rural Utility Services of the United States of America, for Interim Financing, and for Section 392.280.2, RSMo (HB 360) Accounting Authority Orders.

*Case No. TU-2005-0358
Decided June 14, 2005*

Telecommunications §19. Staff believes that the proposed financing is reasonable although it will result in a significant change in Alma's consolidated capital structure. Alma's long-term financial integrity will not be threatened though.

Telecommunications §21. Alma plans to replace its existing loops and related plant with fiber in order to provide adequate bandwidth to access future voice, data, and video services. This new switch and fiber will be installed in 2005 and 2006.

Telecommunications §25. Alma seeks to borrow \$5,579,000 from the RUS Administration of the US Department of Agriculture in order to upgrade its network and purchase a new switch. This will fund capital improvements consisting of a new switch and fiber subscriber lines.

ORDER APPROVING FINANCING APPLICATION

Procedural History:

On April 8, 2005, Alma Communications Company, doing business as Alma Telephone Company,¹ filed its Application seeking authority to borrow certain funds and to pledge part of its system assets as security for the loan. Alma simultaneously filed its Motion for Protective Order.

Alma states that it is a small, rural incumbent local exchange carrier ("ILEC") with some 350 customers in a single exchange just north of Concordia, Missouri. Alma seeks authority to borrow up to \$5,579,000 from the Rural Utility Services Administration ("RUS") of the United States Department of Agriculture in order to upgrade its network and purchase a new switch. The project, as planned, will take two years. Alma also seeks approval to borrow funds as interim financing until the proceeds of the loan from RUS become available. Because Alma's last major project was more than 30 years ago, Alma presently has no debt and its capital structure is 100 percent equity. However, if the present application is approved, Alma will be left with an unusually high level of debt.

Also as part of the proposed transaction, Alma seeks certain Accounting Authority Orders ("AAOs") pursuant to Section 392.280.2, RSMo Supp. 2004 (HB 360). That provision states:

¹ Presumably, the reference to Alma of Missouri, Inc., at page 3 of the Application is an error.

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Notwithstanding the provisions of subsection 1 of this section, a telecommunications company may request the commission to authorize minimum depreciation rates in lieu of fixed rates, and to record depreciation expense on the basis of depreciation rates in excess of such minimum rates. The reasonableness of any request for an increase in the tariffed rates for noncompetitive telecommunications service shall be considered on the basis of the minimum authorized depreciation rates, and the depreciation expense attributed to any test period shall be calculated on the basis of the company's minimum depreciation rates regardless of the depreciation expense actually recorded by the telecommunications company. Where minimum depreciation rates have been authorized pursuant to this subsection, the commission may prescribe new minimum depreciation rates in a general rate proceeding and use those new minimum depreciation rates to determine the reasonableness of tariffed rates for telecommunications service in that general rate proceeding. In any proceeding to consider a request for an increase in the tariffed rates for telecommunications service, the telecommunications company shall utilize for the purposes of such proceeding the depreciation reserve levels which have occurred on the basis of the recorded depreciation expenses.

Under this section, Alma seeks authority to book almost \$300,000 in extraordinary retirements and to use certain proposed depreciation rates "which will more appropriately reflect the actual useful life of modern technology, plant, and equipment[.]"

The Commission's Staff filed its Memorandum and Recommendation on May 18. Therein, Staff states that the controlling standard is "not detrimental to the public interest."² Staff states further:

Staff has reviewed the Application, consulted with Alma, conducted discovery and analyzed the matter. As a result of that process, Staff prepared its Memorandum and Recommendation attached hereto as Appendix A. Staff opines that the transaction is not detrimental to the public interest and recommends approval of the Application subject to the two conditions set out in Appendix A.

Those conditions are:

1. That the Commission reserves the right to consider the ratemaking treatment to be afforded these transactions and the resulting cost of capital in a later proceeding; and

² *In the Matter of the Application of Le-Ru Telephone Company for Authority to Borrow an Amount not to Exceed \$9,164,700 from the Rural Utilities Service, the Rural Telephone Bank and the Federal Financing Bank and in Connection therewith to Execute an Amending Telephone Loan Contract Amendment, Promissory Notes, and a Restated Mortgage, Security Agreement and Financing Statement*, 9 Mo. P.S.C. 3d 229, 231 (August 15, 2000).

2. That the Company shall not pay dividends to its shareholders, make investments other than those currently contemplated under this Application or incur additional debt until the Company achieves a 3-year average common equity to total capital ratio of at least 38 percent and a 3-year average Debt Service Coverage ratio of at least 1.50 times.

Discussion:

Alma seeks authority to borrow up to \$5,579,000 from the RUS in order to fund capital improvements consisting of a new switch and fiber subscriber lines. Alma is a small, rural incumbent local exchange carrier with some 350 customers in and around the town of Alma, Missouri. Alma last updated its subscriber lines and plant in 1972. Staff states that Alma's current network is "fully used, near fully consumed, and in need of replacement with more modern plant." Alma's Mitel digital switch, purchased in 1992, is no longer supported by the manufacturer and thus cannot be upgraded to meet mandatory regulatory requirements, such as local number portability. Alma intends to install a next generation "softswitch" with IP technology. Alma also plans to replace its existing loops and related plant with fiber in order to provide its subscribers with adequate bandwidth to access future voice, data and video services. With the exception of a few technical specifications, Alma will be 100% fiber to the home upon completion of this project. The new switch and fiber will be installed in 2005 and 2006. Staff states that its Telecommunications Department has no objections to Alma's proposed capital improvements.

Staff states that, in its opinion, the proposed financing is reasonable. The loan approved by the RUS will "bear interest at the Cost-of-Money Interest Rate determined by the Government pursuant to 7 U.S.C. 935(d)(2)(A) of the Act and its implementing regulations, as amended from time to time (7 C.F.R. 1735.31(c)) and the portion of the Telecommunications Loan specified in Schedule 1 hereto will bear interest at the rate of five percent (5.00%) per annum." Although the proposed financing will result in a significant change in Alma's consolidated capital structure, Staff believes that its long-term financial integrity will not be threatened. With the initial draw down of \$1,925,000 in 2005, Alma's Total Debt to Total Capital Ratio will move from 0.00% to 59.86%. With the second draw down of \$2,600,000 in 2006, the ratio will move to 81.28%. By 2009, Staff expects the ratio to be 80.83%. For at least five years, Alma will be highly leveraged. However, the Commission approved a similar financing for Ozark Telephone Company in 1998, which has since reduced its Total Debt to Total Capital Ratio from 80.00% to 48.50%, and raised its equity to 51.5%.

A condition of the loan required by the RUS is a minimum Times Interest Earned Ratio ("TIER") of 1.00 through December 31, 2008, rising thereafter to 1.50. Although the RUS has calculated that Alma can meet these requirements, and has therefore approved the loan, Staff's calculations predict a TIER for Alma of only 1.31 by the end of 2009 and a TIER of -0.35 in 2006.³ Upon inquiry, Staff learned that

³ The RUS calculated a TIER of 2.68 for the end of 2009. The RUS also calculated a Debt Service coverage ratio of 2.02 for the end of 2009, compared to Staff's calculation of 1.79.

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RUS's assumptions differed in certain respects from Staff's, yielding different results. One important difference between the calculations made by Staff and RUS is that RUS assumed that Alma would borrow the full amount approved, while Staff assumed that Alma would only borrow \$4,525,000 as indicated in Alma's application. Staff reports that the RUS stated that it would still approve the loan even if Staff's figures were used.

Staff recommends that the Commission authorize the amortization of the extraordinary retirement of the \$122,396 undepreciated value of Alma's present Mitel switch in three equal annual amounts in 2006, 2007 and 2008. Staff notes that Alma has evidently overlooked the Commission's Telephone Authority Order No. 991, dated November 12, 1993, wherein the Commission authorized Alma to use a 5.0% annual depreciation rate after December 31, 1992. Alma's filings in the present case reflect a depreciation rate of 4.5%. The use of the wrong depreciation rate would have contributed significantly to the under-recovery of the Mitel switch. Staff also recommends that the Commission authorize the amortization in three equal, annual amounts in 2006, 2007 and 2008 of the extraordinary retirement of the undepreciated value of Alma's building, \$15,930, and Alma's outside plant that will be replaced, \$146,074.

Alma also seeks, and Staff recommends that the Commission authorize, the use of higher minimum depreciation rates in lieu of fixed rates for 2005 and subsequent years as allowed by Section 392.280.2, RSMo 2002. Any subsequent rate proceeding would use depreciation reserve levels based on the recorded depreciation expenses. Alma's proposal would permit a more rapid recovery of capital invested in plant and equipment. Alma suggests that this would better reflect the actual useful life of telephone technology, plant and equipment. Staff notes its position that most of Alma's accounts should have increased depreciation accruals.

Alma did not file any response or reply to Staff's Memorandum and Recommendation and presumably accepts the suggested conditions. Although the Office of the Public Counsel is a party to this case, it did not file a recommendation or a response to Staff's recommendation.

The Commission has reviewed and considered Alma's application and the Recommendation and Memorandum of Staff and concludes that the proposed transaction is not detrimental to the public interest and should be approved. The Commission will require Alma to comply with the conditions recommended by Staff.

IT IS THEREFORE ORDERED:

1. That the Application for Authority and Approval to Issue a Note and Enter into a Loan Agreement, Mortgage, Security Agreement, and Financing Statement to Borrow Funds from the Rural Utility Services of the United States of America, for Interim Financing Approval, and for Section 392.280.2, RSMo (HB 360), Accounting Authority Orders filed by Alma Communications Company, doing business as Alma Telephone Company, on April 8, 2005, is approved.

2. That Alma Communications Company, doing business as Alma Telephone Company, is authorized to obtain such interim financing as may be necessary in order to complete the project discussed in the application approved in Ordered Paragraph No. 1, above.

3. That Alma Communications Company, doing business as Alma Telephone Company, is authorized to do any and all other things incidental, necessary or appropriate to the performance of any and all acts specifically authorized in this order, including executing all documents necessary for the financing authorized in this proceeding.

4. That the authority granted to Alma Communications Company, doing business as Alma Telephone Company, in this order is subject to the following conditions, with which Alma Communications Company, doing business as Alma Telephone Company, is directed to comply:

A. That the Commission reserves the right to consider the ratemaking treatment to be afforded these transactions and the resulting cost of capital in a later proceeding; and

B. That the Company shall not pay dividends to its shareholders, make investments other than those currently contemplated under this Application or incur additional debt until the Company achieves a 3-year average common equity to total capital ratio of at least 38 percent and a 3-year average Debt Service Coverage ratio of at least 1.50 times.

5. That Alma Communications Company, doing business as Alma Telephone Company, is hereby authorized to amortize certain extraordinary retirements in three equal annual amounts in 2006, 2007 and 2008, as discussed above.

6. That Alma Communications Company, doing business as Alma Telephone Company, is hereby authorized to book depreciation amounts as determined by the rates set out in the column headed "Rates That Will Be Booked" on Attachment F to the Memorandum filed on May 18, 2005, by the Staff of the Missouri Public Service Commission in this case.

7. That the Commission specifically makes no finding as to the prudence of the transactions herein approved and reserves the right to consider the prudence of these transactions in a later proceeding.

8. That this order shall become effective on June 24, 2005.

9. That this case may be closed on June 25, 2005.

Davis, Chm., Gaw, Clayton, and
Appling, CC., concur.
Murray, C., dissents, with separate
dissenting opinion to follow.

Thompson, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

In its June 14, 2005 order, the Commission approved Alma Communications Company's, d/b/a Alma Telephone Company (Alma), Application seeking authority to borrow certain funds and to pledge part of its system assets as security for the loan. Specifically, Alma sought authority to borrow up to \$5,579,000 from the Rural Utility Services Administration to replace an old switch, construct a new building to house it, and to build fiber subscriber lines to replace the copper lines now in use. The Rural Utility Services Administration has pre-approved this loan, in part because Alma stands to receive more than \$600,000 annually from the Universal

Service Fund (USF) that can be used to pay the debt service for the loan over the next 26 years. I must dissent from the Commission's Order because I am concerned that the use of the USF subsidy contemplated in this case contributes to the magnitude of the problems currently plaguing the USF and because I believe that the financing of this project is detrimental to the public interest.

The debt authorized by the Commission's Order means that Alma's Total Debt to Total Capital Ratio will be more than 80% for at least four years. With only 350 customers in its exchange, Alma will effectively be borrowing almost \$16,000 per customer,¹ the majority of which will be spent on placing fiber lines, the "gold standard" for wireline telecommunication companies, to each customer's premises. These fiber-to-the-premises lines will also allow Alma to develop broadband and video services that are outside of its primary business purpose of providing telecommunications services. Alma estimates that the average annual debt service payments will range from \$250,000 to \$300,000 for 26 years. And to make this loan payment, Alma, rather than relying even in part on increased rates for customers, is solely relying on disbursements from the USF to repay the loan. The USF disbursements will increase more than \$600,000 annually simply because of the new investment in plant – without any examination as to whether Alma or its subscribers have an economic need for this amount. The disbursements from the USF will be more than adequate to cover the annual debt service payments, leaving Alma with a tidy profit of \$300,000 to \$350,000 annually, over and above other profits the company already realizes.

A recent article explains the function of the USF and the crisis that it is currently facing:

"Under the existing universal service program, subsidies are directed to rural areas, where it is often more costly to provide traditional wireline telephone service. . . . These subsidies are funded through a surcharge on long-distance calls that, under the Telecommunications Act, are classified as 'telecommunications.'

"The surcharge – really a tax – appears on telephone bills as a 'universal service fee.' Largely because more and more subsidies are being directed to rural telephone companies, the universal service fee has nearly doubled in the past several years, and it now **exceeds 10 percent.**"²

One of the purposes of the Universal Service Fund is to bring "reasonably comparable" telecommunications services to those areas in this country where the

¹ This amount is being financed over 26 years.

² *IT&T NEWS* (Info Tech & Telecom News), "Crisis Looms in Universal Service", pp. 1-2, June 2005. The article goes on to discuss that, because people are using new technology for communications services (i.e., VoIP, cable telephony, etc.), the funding base is shrinking while support obligations continue to grow. *Id.*, p.2. Therefore, the remaining long-distance consumers will continue to see larger and larger surcharges. It should also be noted that the high cost subsidy is available to rural carriers without regard to the income level, i.e., economic need, of the customers served thereby.

customer base is so low that it is costly and non-economical to provide service.³ Funding for the USF to subsidize these reasonably comparable services is provided by every long-distance telephone subscriber in this country.⁴ "Reasonably comparable" telecommunications services should mean service that is comparable to what the average telephone subscribers receive in more populated areas where costs for provisioning such services are much lower. "Reasonably comparable" telecommunications services should not mean services that far exceed what the average urban telephone subscribers are receiving. Moreover, the "reasonably comparable" standard applies to rates charged by urban and rural carriers.

Alma is only charging its customers \$6.50 for basic local telecommunications services, and will not be raising this rate despite the improvements. This basic local rate is far less than the average urban consumer pays – putting Alma's subscribers in a far better position than those subscribers living in urban areas. Thus, Alma's subscribers are receiving the best level of services available in telecommunications at rates that are well below what the average subscriber pays, all because they have the benefit of receiving a large government subsidy. The USF should not be leveraged to provide rural, high-cost carriers with broadband and video capabilities that exceed the "reasonably comparable" standard, and that are unnecessary for provisioning basic telecommunications services.⁵

Even more troublesome is that Alma, like many rural telephone companies, will be receiving universal service subsidies that far exceed its operating costs and debt

³ See 47 U.S.C. § 254(b)(3), which reads as follows:

"Consumers in all regions of the Nation . . . , should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, *that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charges for similar services in urban areas.*"

(emphasis added). Note that the test is not just that rural, high cost areas should get advanced telecommunications services, but that it should be reasonably comparable to that available in urban areas at a reasonably comparable rate. Most urban areas do not have fiber to the premises of every subscriber, and those urbanites that do have broadband and high speed video services have had to pay a premium to obtain such access.

⁴ "The High Cost support mechanism provided approximately \$3.4 billion in support in fiscal year 2004." See the Federal Communications Commission's combined docket no. FCC 05-124: *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration and Oversight*, WC Docket No. 05-195; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6; *Rural Health Care Support Mechanism*, WC Docket No. 02-60; *Lifeline and Link-Up*, WC Docket No. 03-109; *Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, ¶ 44.

⁵ Alma admitted that broadband and video were potential future services that could be provided to its 350 customers that would be operated either through Alma itself, or through a subsidiary company that could "rent" the fiber lines for provisioning these services. Either way, this means added profits to Alma's owners subsidized by the USF.

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service coverage.⁶ I estimate that Alma stands to profit through universal service subsidies by as much as \$350,000 annually – that is a profit of \$1000 per customer on an annual basis (not counting other sources of revenue) that is not available to non-rural, low-cost carriers. It is unacceptable to me to continue sanctioning this abuse of the USF. It was argued by the Commission that we should not prevent Missouri companies from taking the same advantage of the USF as other companies in other states are doing, thereby allowing revenue that could benefit Missouri companies to go to other states. While I understand this argument, I do not believe that adding to the abuse of the USF because “everyone else is doing it” is the right thing to do.

Finally, I believe that the approval of this amount of debt, coupled with the reliance on USF for repayment is detrimental to the public interest. There is much discussion in the industry and in Congress about reforms to the universal service program. The Federal Communications Commission very recently issued a Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in a combined docket that seeks to conduct a broad review of the management, administration and oversight of the Universal Service Fund.⁷ Discussion of this reform ranges from ensuring that benefits to rural, high-cost areas continue to flow⁸ to completely dismantling the current system, and instead raising funds for universal service from general tax revenues and distributing funds directly to consumers through vouchers for purchasing the necessary telecommunications services.⁹ Additionally, the FCC is reviewing the Intercarrier Compensation regime in an attempt to craft a more uniform system. This review could result in lower payments to the telecommunications carrier that terminates a call on its network.¹⁰ Should there be radical changes in the distribution of Universal Service funds or in the Intercarrier Compensation regime, or both, the income that Alma is expecting to receive for the next 26 years in order to cover its debt service payments may suddenly evaporate – or in the very least decrease substantially. This could leave Alma buried in debt and scrambling for the means to repay it.

⁶ I do not mean to infer that Alma is doing something illegal. In fact, Alma legitimately is taking advantage of a federal subsidy program like many other rural carriers in this state and country. The fact that this proposal is legal does not make it right.

⁷ See *In the matter of Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, et al.*, *supra* FCC Docket No. 05-124 (Released June 14, 2005).

⁸ See Congressional Rural Caucus Press Release, February 2, 2005, “CRC Holds Forum to Discuss the Future of Rural Telecom”.

⁹ *SENDING THE RIGHT SIGNALS: Promoting Competition through Telecommunications Reform*, Summary of Findings, Published by the U.S. Chamber of Commerce, Publication #0331.

¹⁰ See *Further Notice of Proposed Rulemaking, In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; FCC 05-33 (March 3, 2005). “Intercarrier Compensation” involves a complex pricing system that essentially requires the payment of a fee by the sending carrier to the receiving carrier for the privilege of allowing its subscribers to connect to subscribers on another network.

**In the Matter of the Assessment Against the Public Utilities in
the State of Missouri for the Expenses of the Commission
for the Fiscal Year Commencing July 1, 2005.**

*Case No. AO-2005-0501
Decided June 24, 2005*

Public Utilities §1. The Commission assessed a total of \$13,777,864 to public utilities in proportion to their respective gross intrastate operating revenues during the proceeding calendar year.

ASSESSMENT ORDER FOR FISCAL YEAR 2006

Pursuant to 386.370, RSMo Supp. 2004, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2005. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$ 17,046,840. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$9,519,772. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$7,527,068.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$280,000. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2005, is estimated to be \$2,988,976. The Commission deducts these amounts and estimates its Fiscal Year 2006 Assessment to be \$13,777,864. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2004, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at <http://www.psc.mo.gov>.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

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Electric	\$ 4,818,852
Gas	\$ 3,866,442
Heating	\$ 78,427
Water	\$ 765,124
Sewer	\$ 311,782
Telephone	\$ 3,937,237
Total	\$13,777,864

The Commission allocates a proportionate share of the \$13,777,864 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2005. The assessment shall be due and payable on or before July 15, 2005, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2005, October 15, 2005, January 15, 2006, and April 15, 2006. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission
 Budget and Fiscal Services Department
 P.O. Box 360
 Jefferson City, MO, 65102-0360

IT IS THEREFORE ORDERED:

1. That the assessment for fiscal year 2006 shall be as set forth herein.
2. That the Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. That, on behalf of the Commission, the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2005.
4. That each public utility shall pay its assessment as set forth herein.
5. That the Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.
6. That this order shall become effective on July 1, 2005.

Colleen M. Dale, Chief Regulatory Law
 Judge, by delegation of authority pursuant
 to Section 386.240, RSMo 2000.

**In the Matter of a Recommendation Concerning the Surcharge
for Deaf Relay Service and Equipment Distribution Program
Fund.**

*Case No. TO-2005-0308
Decided June 28, 2005*

Telecommunications §14. The Commission raised the Relay Missouri Program surcharge from \$.10 per month per access line to \$.13 per month.

Telecommunications §29. The local exchange telephone company is to retain one percent or \$30.00 whichever is greater, of the surcharge collected each month.

APPEARANCES

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Robert J. Gryzmala, Senior Counsel, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, One SBC Center, Room 3516, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., d/b/a SBC Missouri.

Leland B. Curtis, Curtis, Heinz, Garrett & O'Keefe, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for Big River Telephone Company, LLC.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, 220 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102-2230, for the Office of the Public Counsel and the public.

REGULATORY LAW JUDGE: **Vicky Ruth, Senior Regulatory Law Judge.**

REPORT AND ORDER

Syllabus:

The Commission finds that the Deaf Relay surcharge amount should be raised from \$.10 per month per access line to \$.13 per month per access line. The Commission also finds that the retention amount shall remain at the current level of \$30.00 or one percent, whichever is greater.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History and Background:

The Commission ordered the implementation of the Relay Missouri Program in Case No. TO-90-174. The Relay Missouri Program is a statewide dual-party telephone relay service, created under Section 209.253, RSMo 2000, for the deaf, hearing-impaired and speech-impaired. Dual-party relay services are those services that allow third-party intervention to connect deaf, hearing-impaired, and speech-impaired persons with telecommunications devices for the deaf (TDD) and the telephone system, in order to make available "reasonable access to telephone service to eligible subscribers."¹

Section 209.255 provides that the Missouri Public Service Commission shall establish a rate recovery mechanism, or surcharge, to recover the costs of implementing and maintaining the programs created by Section 209.253.

The Commission issued an order on February 19, 1991, setting the initial surcharge at \$.06 per month per access line; the surcharge was subsequently raised to \$.13 per month per access line.² By Commission order issued March 6, 2001, the surcharge was reduced to \$.09 per month per access line.³ The Commission raised the surcharge to its current level of \$.10 per month per access line by order issued March 27, 2003.⁴

On March 16, 2005, the Staff of the Commission filed its Recommendation and Memorandum in this case, recommending that the Commission raise the monthly surcharge from \$.10 to \$.15 per access line. Staff also recommended that the Commission maintain the current retention amount for local telephone companies. Staff filed a Corrected Recommendation and Memorandum on March 17, 2005, making minor adjustments, and a Supplemental Staff Recommendation on April 26, 2005.

The Commission held an On-the-Record Presentation on April 27, 2005. During the proceeding, several witnesses testified in response to questions from the Commissioners, the Presiding Officer, and other parties. Following the hearing, Staff filed several posthearing exhibits, with the last one, Exhibit 17, being filed on June 21, 2005. On its own motion, the Commission admitted Exhibits 14 and 15 into the record.

The Relay Missouri fund balance at the end of February 2005 was approximately \$2,822,000.⁵ This fund balance has been steadily decreasing for several years.⁶ Monthly revenues for the fund have remained relatively flat.⁷ For the period of July 2003 to February 2005, while a surcharge of \$.10 was in effect, the surcharge average monthly revenue was approximately \$331,800.⁸ Monthly fund distributions

¹ § 209.253.1, RSMo 2000. All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

² Case No. TO-90-174.

³ Case No. TR-2001-182.

⁴ Case No. TO-2003-0171.

⁵ Exhibit 14.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

for such things as traditional relay, CapTel, Telecommunications Equipment Distribution Program (TEDP), and the Central Services Cost Allocation Program during the same period averaged approximately \$418,000.⁹ Staff predicts that based on these trends, at the current surcharge of \$.10, the fund will have a deficit balance in April 2006.¹⁰

Minutes of usage for traditional relay are declining.¹¹ For example, in July 2000, the minutes of usage were approximately 374,000; in January 2005, the minutes of usage were approximately 283,000.¹² The current rate for traditional relay service in Missouri is \$.94 per minute.¹³

CapTel usage, however, has been increasing.¹⁴ CapTel is a third-party relay system that uses a special captioned telephone.¹⁵ The CapTel trial ended in August 2004, and CapTel became a permanent offering in September 2004.¹⁶ CapTel expenditures from October 2004 through January 2005 averaged approximately \$41,300 per month, with the January CapTel expenditure at nearly \$52,000.¹⁷ The average CapTel usage from October to December 2004 was approximately 152 minutes per phone.¹⁸ The usage in January 2005, however, averaged 167 minutes.¹⁹ Staff noted that the average CapTel usage has significantly exceeded the prior forecasts, where an average usage of 100 minutes per phone was projected.²⁰ Moreover, it had previously been projected that the distribution of CapTel phones would be around 11 per month; instead, the distribution has been around 20 phones per month.²¹ As of December 31, 2004, there were 191 CapTel phones in circulation.²² By the time of the On-the-Record Presentation, in April 2005, this number had risen to 253 CapTel phones.²³ Sprint Communications Company, L.P., provides CapTel services and is reimbursed at the rate of \$1.45 per minute.²⁴

⁹ *Id.*

¹⁰ *Id.*

¹¹ Exhibit 14, and Transcript, p. 30, lines 22-25.

¹² Exhibit 14.

¹³ Exhibits 14 and 15, and Transcript, p. 112, Line 25 – p. 113, line 2.

¹⁴ *Id.*

¹⁵ Transcript, p. 36.

¹⁶ Exhibit 14.

¹⁷ *Id.*

¹⁸ Exhibit 14, and Transcript, p. 21, lines 10-17.

¹⁹ Transcript, p. 21, lines 18-19.

²⁰ Exhibit 14, and Transcript, p. 39, line 13 – p. 40, line 9.

²¹ Transcript, p. 39, lines 16-25.

²² Exhibit 14.

²³ Transcript, p. 39, lines 23-24.

²⁴ Exhibits 14 and 15, and Transcript, p. 112, line 18 – p. 113, line 2, and Exhibit 4.

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Issues:

1. At what amount should the Commission set the Relay Missouri Program surcharge?

The current surcharge is set at \$.10 per month per access line. Staff recommends that the Commission raise the surcharge to \$.15 per month per access line. Public Counsel argues that the surcharge should be raised to no more than \$.12 or \$.13 per month per access line. SBC Missouri and Big River Telephone did not take a position on this issue.

Public Counsel did not provide any evidence as to why the surcharge should be raised to no more than \$.12 or \$.13 per month per access line. Staff provided testimony and numerous exhibits that show the effect of various surcharges and average CapTel usage on the fund balance. Staff provided similar exhibits demonstrating the effect on the fund balance of various surcharges and a moratorium or other limitation on CapTel distribution. Staff, however, also indicates that it does not believe that the Commission has the legal authority to limit, or place a moratorium on, the distribution of CapTel phones.

The Commission is reluctant to raise the surcharge by 50 percent - from \$.10 to \$.15 per month per access line - at this time. Nonetheless, the Commission acknowledges that monthly revenues (averaging \$331,800) are lagging behind monthly distributions (averaging \$418,000).²⁵ Thus, the Relay Missouri fund balance will continue to decline, even to the point of having a negative balance. In order to assure that adequate funds are available for the Relay Missouri program, the Commission finds that it is necessary to raise the surcharge. Thus, the question becomes one of how much should the surcharge be raised. In making this decision, the Commission must balance its statutory obligation to assure that adequate funds are available against the need to be fiscally responsible and not raise the surcharge any more than is necessary.

Exhibit 9, Table 1, indicates that if the Commission implements a surcharge increase to \$.13 per month per access line (effective September 2005), and assuming an average of 153 minutes for CapTel usage and an average distribution of CapTel phones of 20 per month, the fund would have a balance of approximately \$193,773 in September 2006. Although this projected fund balance is less than the Commission would like, the Commission desires to keep the surcharge as low as possible. Therefore, the Commission finds that a surcharge increase to \$.13 per month per access line is reasonable and necessary. The Commission encourages the Missouri Assistive Technology Advisory Council to increase its efforts to educate subscribers regarding the costs associated with both CapTel and Traditional Relay services.

All the parties agreed that if the Commission orders an increase in the surcharge, local telephone companies should be given adequate time to implement that increase. Suggestions as to what constitutes an adequate period of time ranged from 45 days to 60 or 90 days. The Commission finds that 60 days notice is adequate and will therefore order that the surcharge increase be effective on September 1, 2005.

²⁵ Exhibit 14.

2. The Retention Amount

Currently, local telephone companies are allowed to retain \$30.00 or one percent of the amount collected from the Relay Missouri surcharge, whichever is greater. If a carrier collects a monthly surcharge amount under \$30.00, the carrier will retain the amount under \$30.00 as its full payment for recovery of the billing. Should the Commission continue this retention amount?

Section 209.257, RSMo 2000, allows the Commission to set a percentage that a telephone company may retain from the Deaf Relay Service and Equipment Distribution Fund surcharge collected to defray the administrative costs. In Case No. TO-90-174, the Commission set the amount of retention at one percent or \$30.00, whichever is greater. In Case No. TO-2003-0171, the Commission clarified that if a carrier collects a monthly surcharge amount under \$30.00, the company will retain the amount under \$30.00 as its full payment for recovery of the billing, collecting, remitting and administrative costs attributed to its collection of the surcharge for that month. That is, if the carrier collects a surcharge amount of less than \$30.00, the company may retain that amount, but may not attempt to recover the difference from the fund. Staff recommends that the Commission keep the retention amount at the current level. No other party offered a position on this issue.

The Commission finds that it is just and reasonable to keep the retention amount at the current level of \$30.00 or one percent, whichever is greater. The Commission will again clarify that if the carrier collects a monthly surcharge amount under \$30.00, the carrier may retain the amount under \$30.00 as its full payment for recovery of the billing, collecting, remitting and administrative costs attributed to its collection of the surcharge for that month.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Section 209.253, RSMo 2000, requires the Commission to provide a statewide dual-party relay system, using third-party intervention to connect deaf, hearing-impaired, and speech-impaired persons and offices of organizations representing the deaf, hearing-impaired, and speech-impaired, with telecommunication devices for the deaf and the telephone system, making available reasonable access to telephone service to eligible subscribers.

Section 209.255 provides that the Commission shall establish a rate recovery mechanism to recover the costs of implementing and maintaining the programs provided for in Section 209.253.

Section 209.257 directs the Commission to determine the appropriate percentage of the surcharge to be deducted and retained by the local exchange telephone company to allow the company to recover the billing, collecting, remitting, and administrative costs attributed to the surcharge. Section 209.259.3 provides that concurrent with the review of the surcharge, the Commission shall review the percentage deducted and retained, under Section 209.257, by the local exchange telephone company and if necessary, order adjustments to the percentage to

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assure a just and reasonable compensation to the local exchange telephone company. The Commission previously determined that local telephone companies are allowed to retain \$30.00 or one percent of the amount collected from the Relay Missouri surcharge, whichever is greater. The Commission finds that this retention level remains just and reasonable. However, the Commission will again clarify that if the amount of the surcharge collected is less than \$30.00, the company may retain that amount, but may not attempt to recover the difference from the fund.

Section 209.258 establishes a deaf relay service fund for the purpose of paying the expenditures incurred in the operation of the statewide dual-party relay service and equipment distribution program.

Section 209.259 requires the Commission to review the Deaf Relay Service and Equipment Distribution Program Fund surcharge no less frequently than every two years, but no more frequently than annually. The statute also requires the Commission to order changes in the amount of the surcharge as necessary to assure available funds for the provision of the programs established in Section 209.253. As noted previously, the Commission finds that in order to assure available funds for the programs, the surcharge shall be raised from \$.10 to \$.13 per month per access line, effective September 1, 2005.

IT IS THEREFORE ORDERED:

1. That the Relay Missouri surcharge shall be raised to \$.13 per month per access line, effective September 1, 2005.
2. That local exchange companies shall notify their customers of the increase by a notice included with or printed on each customer's bill.
3. That except as provided in the next sentence, the local exchange telephone company is to retain one percent or \$30.00, whichever is greater, of the surcharge amount collected each month. If the carrier collects a monthly surcharge amount under \$30.00, the carrier will retain the amount under \$30.00 as its full payment for recovery of the billing, collecting, remitting, and administrative costs attributed to its collection of the surcharge for that month.
4. That the Staff shall continue to monitor the Deaf Relay Service and Equipment Distribution Program Fund and shall submit quarterly reports to the Commission regarding the state of the fund. The first report shall be submitted no later than October 1, 2005.
5. That this Report and Order shall become effective on July 1, 2005.

Davis, Chm., Gaw, Clayton, and
Appling, CC., concur;
Murray, C., concurs, with separate
concurring opinion attached;
and certify compliance with the
provisions of Section 536.080, RSMo.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

It is with great reluctance that I vote to increase, once again, the surcharge for the Deaf Relay Service and Equipment Distribution Program Fund, particularly since the Commission is unwilling to test its authority to limit or place a moratorium on the distribution of CapTel phones at this time. I do not, however, desire to see the fund decline into negativity before the Commission has thoroughly explored every avenue available to it to place reasonable controls on the growth of the expenditures. While I am not convinced that the potential jeopardy of the fund is as great as Staff's projections, I realize that the balance is currently on a downward decline.

Prior to the next review, I want a written report from Staff outlining the full extent of the Commission's authority to place limitations on how the fund is expended. As soon as possible, I would like to see recommendations concerning legislative changes that should be sought to make the program sustainable and fiscally responsible. I am particularly interested in legislatively establishing a means test for participation in the program. Other reasonable controls, such as an upper limit on the number of CapTel phones distributed each year and on the minutes of use that are reimbursable should be pursued.

I expect the Missouri Assistive Technology Advisory Council and the deaf, hearing-impaired and speech-impaired community to assist Staff in these efforts and to actively and quickly pursue all legislative changes that are necessary to sustain the program in a fiscally responsible manner.

I have no doubt that the recipients of the subsidy are greatly aided in their telecommunications activities. It is not my desire to end the program. It is, however, imperative that its growth be controlled. The telephone subscribers who are required to pay for this program through a monthly surcharge deserve no less.

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A").*

*Case No. TO-2005-0336
Decided July 11, 2005*

Telecommunications §46.1 The Commission agrees with SBC that many changes are necessary regarding the Final Arbitrator's Report. The Commission orders for the changes to be made and SBC's clarifying language to be adopted.

APPEARANCES

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* The Commission issued an order extending filing deadline and amending interconnection agreements by interlineation on July 14, 2005. This case was appealed to the United States District Court - Eastern District of Missouri (05CV01264CAS).

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REGULATORY LAW JUDGE:

Kevin A. Thompson, Deputy Chief.

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Mick Johnson, Utility Operations Technical Specialist II, Utility Operations Division, Missouri Public Service Commission.

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Nathan Williams, Senior Counsel, Office of the General Counsel, Missouri Public Service Commission.

ARBITRATION ORDER

Procedural History

Petition for Arbitration:

This arbitration commenced on March 30, 2005, when Southwestern Bell Telephone, L.P., doing business as SBC Missouri, filed its Petition for Arbitration with the Commission pursuant to Section 4.2 of the M2A, Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. SBC's petition asked the Commission to arbitrate unresolved issues in the negotiation of interconnection agreements ("ICAs") between SBC and various competitive local exchange carriers ("CLECs") to replace the M2A, the generally-available interconnection agreement approved by the Commission on March 15, 2001, in conjunction with its recommendation to the United States

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Federal Communications Commission ("FCC") that SBC be approved to provide in-region long distance service in Missouri pursuant to Section 271 of the Act.¹

The procedural history of this case up to the filing of the Arbitrator's Final Report are set out in that report and need not be repeated here.

The Arbitrator's Final Report:

Due to the shortened schedule for this arbitration, the Arbitrator did not issue a Draft Report as called for by Rule 4 CSR 240-36.040(19). Instead, the Arbitrator filed his Final Arbitration Report of some 2,075 pages on June 21.² The report included the Decision Points ("DPs") formulated by the parties, grouped topically so far as possible, a discussion of pertinent points on each DP and a decision. The report also included both summary and detailed matrices showing the proposed contractual language selected for inclusion in each ICA.

The Parties' Comments:

The parties filed comments on the Final Arbitrator's Order on June 24. Rule 4 CSR 240-36.040(20) concerns the parties' comments on the draft arbitration report. In the present case, there was no draft arbitration report and the parties filed comments on the Final Arbitration Report instead. Rule 4 CSR 240-36.040(20) states:

Each party and any member of the public may file comments on the arbitrator's draft report within ten (10) days after it is filed with the commission. Such comments shall not exceed twenty (20) pages, unless otherwise authorized by the arbitrator, and shall be directed to perceived factual, legal or technical errors made in the draft report. Commenters shall make specific references to the record to support each claim of error. Comments that merely reargue positions taken in briefs will be accorded no weight. Reply comments, if permitted by the arbitrator, shall be limited to identifying misrepresentations of law, fact or condition of the record contained in comments.

Generally speaking, the parties' comments fell into certain categories. First, parties asserted that the Arbitrator had overlooked certain Decision Points ("DPs"), either by failing to provide a decision where the issue remained open or by providing a decision where the issue had been settled. Second, parties complained that certain of the Arbitrator's decisions were inconsistent, either because the Arbitrator's decision on one DP appeared to contradict his decision on another DP elsewhere

¹ *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996*, Case No. TO-99-227, (Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), issued March 15, 2001).

² The Arbitrator issued his Final Arbitration Report on the 26th day following the end of the hearing and on the 15th day after the parties filed their Briefs.

in his report or because the selected contractual language appeared to be inconsistent with the Arbitrator's stated decision. In some cases, such inconsistencies appear to reflect the fact that none of the offered language was appropriate or desirable. Third, parties objected to various of the Arbitrator's decisions as being contrary to law. Fourth, parties objected to various of the Arbitrator's decisions as being a bad policy choice.

With respect to those DPs that the parties contend the Arbitrator should not have decided because they were already settled, the Commission points out that it need take no action because the parties are free, under the Act, to substitute their negotiated resolution for any decision of the Arbitrator. Therefore, the parties should simply file their ICA containing the language on which they mutually agree.

Oral Arguments:

The Commission heard oral arguments on June 29 and 30. Each party was permitted to argue affirmatively in support of its comments and in opposition to the comments filed by other parties.

The Commission's Decision:

Rule 4 CSR 240-36.040(24), "Commission's Decision," provides:

The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its discretion. The commission shall make its decision resolving all of the unresolved issues no later than the two hundred seventieth day following the request for negotiation.³ The commission may adopt, modify or reject the arbitrator's final report, in whole or in part.

In modifying the Final Arbitration Report, the Commission may, as necessary, "[adopt] a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission and the Federal Communications Commission pursuant to that section."⁴

Like the Arbitrator, the Commission must be guided by Section 252(c) of the Act, which provides:

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall —

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

³ The M2A provides that negotiations on successor ICAs must start by the 135th day prior to its expiration and, where negotiations are ongoing, that the M2A will remain in effect for 135 days following its expiration, making a total of 270 days.

⁴ Rule 4 CSR 240-36.040(5)(E).

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(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

With respect to the public interest in the regulation of telecommunications, the Missouri General Assembly has provided an express statement of public policy to guide the Commission:⁵

The provisions of this chapter shall be construed to:

(1) Promote universally available and widely affordable telecommunications services;

(2) Maintain and advance the efficiency and availability of telecommunications services;

(3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;

(4) Ensure that customers pay only reasonable charges for telecommunications service;

(5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

(7) Promote parity of urban and rural telecommunications services;

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

The Role of the Arbitrator in the Ongoing Proceedings:

At the Oral Argument on June 29, a member of the Commission raised a question concerning the propriety of the participation of the Arbitrator in the second step of the two step arbitration proceeding contemplated by the Commission's rule.⁶ In the first step, the Arbitrator independently conducted proceedings that culminated in the Final Arbitrator's Report. In the second step, the parties have addressed written comments and oral arguments to the Commission in an effort to modify portions of the Final Arbitrator's Report. Commissioner Gaw questioned

⁵ Section 392.185, RSMo Supp. 2002.

⁶ "Tr. 1192.

whether it was appropriate for the Arbitrator to preside given the fact that it was his decision that was the subject of the parties' various objections.

The Arbitrator polled the parties on June 29, and none expressed any objection to his presiding at the Oral Argument.⁷ However, SBC's counsel stated:

MR. LANE: I certainly don't have any objection to your presiding. I think when the Commission goes to reach its decision, if it needs assistance from someone in the General Counsel's office, or more appropriately maybe in the Regulatory Law Judges' office, it would probably be better to at least have somebody else involved in that process. But I certainly don't have any objection to your presiding over this.

* * *

MR. LANE: And to clarify my remarks before we go on, I think our view of it is that the Commission's review here is de novo, and that's a critical factor, and that's where my comments go.⁸

The Commission's Arbitration Rule does not expressly address this point. However, it does provide that the Arbitrator shall merely produce a report to the Commission, as he has done here. This report is not a decision and will not become one, although it may be embodied by the Commission into its decision, in whole or in part. The Commission's proceedings on the Arbitrator's Report, consequently, are not in the nature of an appeal or review. It is, instead, an original proceeding.

For these reasons, the Commission concludes that there is no reason why the Arbitrator cannot participate in the Commission's proceedings.

Further Proceedings:

The Procedural Schedule called for this Commission's Order to be issued by July 6, and provides for subsequent proceedings as follows:

Successor Interconnection Agreements	July 13, 2005
All Parties	4:00 p.m.

Commission Approval of Successor Interconnection Agreements	July 19, 2005
	4:00 p.m.

DECISION

The Missouri Public Service Commission hereby adopts the Final Arbitrator's Report as its decision on each unresolved issue, except as that Report is expressly modified below. The Final Arbitrator's Report is incorporated into this Order by reference.

⁷ *Id.*, at pp. 1192-1194.

⁸ *Id.*, 1192-1193, 1194.

DETAILED ANALYSIS OF COMMENTS

The Commission addresses only those comments here that, in its opinion, required some modification of the Arbitrator's Final Report. All other requested modifications have been considered and rejected.

A. AT&T's Comments:

1. Routine Network Modifications:

AT&T UNE Issue 6: Should SBC MISSOURI's obligation to provide UNEs, if they can be made available via routine network modification, be dependent upon SBC's determination of whether spare facilities exist?

AT&T UNE Issue 18: How should routine network modifications be described in the ICA? Is SBC entitled to charge AT&T for routine network modifications?

Discussion:

AT&T contends that the Arbitrator erred in adopting SBC's proposed language limiting its obligation to perform routine network modifications to spare facilities and by also including language in the UNE Attachment regarding ICB prices for routine network modifications. The Arbitrator found as follows:

SBC Missouri may not limit "routine network modifications" to the attachment of electronics to DS1 Loops. SBC Missouri may recover the costs of such routine network maintenance through either recurring or nonrecurring rates. To the extent that it has an unbundling obligation under §251(c)(3), it must provide the service at TELRIC rates; to the extent that the obligation remains under §271, then the service must be provided at just and reasonable rates.⁹

AT&T states that the purported inconsistencies are found in the Detailed Matrix attached to the UNE section of the Arbitrator's Final Report, which indicates that the Arbitrator adopted SBC's proposed language for section 2.5, including the spare facilities language, as well as SBC's proposed ICB language in sections 4.8.7, 8.5.7.6 and 15.12.6. AT&T states that the Commission should (1) delete the word "spare" from section 2.5 of the language selected by the Arbitrator and (2) delete SBC's proposed language at sections 4.8.7, 8.5.7.6, and 15.12.6 of the UNE attachment.

Decision:

The Commission agrees with AT&T. The language AT&T objects to is indeed inconsistent with other parts of the Arbitrator's Report as AT&T has pointed out. The Commission therefore modifies the Report by deleting the word "spare" from section 2.5 of the language selected by the Arbitrator and deleting SBC's proposed language at sections 4.8.7, 8.5.7.6, and 15.12.6 of the UNE attachment.

⁹ Arbitrator's Report, Section III at p. 59.

2. Access to Digital Cross-connect System (DCS):**UNE Issue 20: Should SBC be required to provide access to DCS, and, if so, under what terms and conditions?****Discussion:**

AT&T states that the Arbitrator erred by adopting SBC's language limiting access to DCS to that provided under SBC's federal tariff. The Arbitrator's Final Report on this issue simply stated that it had been discussed above. The attached Detailed Matrix adopted SBC's proposed language. AT&T asserts that the Arbitrator thereby erred because, to the extent that SBC still has an obligation to provide access to dedicated transport on an unbundled basis, SBC is also obligated to provide access to DCS as a UNE pursuant to § 251 of the Act. AT&T thus alleges an error of law.

AT&T contends that the continued availability of Dedicated Transport at cost-based rates is essential to competition in the local phone market. AT&T explains that DCS is a device that enables a CLEC to access and manage the digital signals of loop and transport facilities and may also provide multiplexing functions and test access capabilities. AT&T points to testimony showing that the DCS confers upon a carrier the significant abilities to groom facilities and optimize trunk and facility utilization.¹⁰ AT&T argues that SBC should be obligated to provide access to DCS as a functionality that is part of the unbundled Dedicated Transport UNE.

SBC's position with respect to DCS is that there is no requirement that SBC Missouri provide access to DCS as a UNE since the FCC has found that DCS is required only with an entrance facility and both the *TRO* and *TRRO* clearly state that entrance facilities are not UNEs. According to SBC, the FCC requires only that DCS be offered: "in the same manner that the incumbent LEC provides such functionality to interexchange carriers."¹¹ Since services are not offered to IXCs as UNEs, there is no rationale for SBC Missouri being required to provide the DCS to CLECs as UNEs either.¹²

Decision:

AT&T points out that the Arbitrator determined, elsewhere in his Report, as follows:

The Arbitrator notes that the *TRO* and *TRRO* limited dedicated transport to facilities between ILEC offices, so DCS need not be provided as part of that UNE but rather on a wholesale basis as SBC suggests.¹³

Similarly, at page 6 of the Pricing Section of the Report, the Arbitrator found the following with regards to cross connects to DCS-4 Wire:

¹⁰ Rhinehart Direct Testimony at p. 61.

¹¹ With the First Report & Order 47 C.F.R. §51.319(d)(2)(iv) and again with the UNE Remand Order §51.319(d)(2)(D).

¹² Silver Direct, pp. 122-125; Smith Direct, pp. 32-34; Smith Rebuttal, pp. 12-14.

¹³ Final Arbitrator's Report, Section IV Pricing, p. 15.

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SBC does not propose to include these services in the contract as they are not Section 251(c)(3) elements. Under the FCC rules, DCS is not a UNE; instead it is a special access functionality which is available under the special access tariff to CLECs and IXCs on an equal basis as required by the FCC rules. Decision: The Arbitrator agrees with SBC for the reasons stated above."¹⁴

The Commission concludes that the Arbitrator did not err.

3. Should the Temporary Rider contain language regarding the manner in which SBC converts delisted elements?

AT&T Temporary Rider Issue 4b: Should the Rider contain language regarding the manner in which SBC converts delisted elements?

Discussion:

AT&T states that, with regards to UNE Rider Issue 4, the Arbitrator adopted SBC's language in places and adopted AT&T's language in other places. AT&T comments on two sections of its proposed language that the Arbitrator rejected, as well as three related sections of SBC's proposed contract language that the Arbitrator adopted, that are "arguably" inconsistent with other determinations the Arbitrator made.

First, the Arbitrator rejected AT&T's proposed sections 2.3.4.1 and 2.3.4.2 in their entirety. The language in section 2.3.4.1 would ensure that conversions from transitional elements would take place "in a seamless manner without any customer disruption or adverse effects to service quality." The language further provides that the parties will work together to develop a mutually agreeable conversion process. The end of AT&T's proposed section 2.3.4.1 provides that if the parties cannot agree on a mutually agreeable conversion process, the deadline for conversions is extended and SBC will continue to bill the transitional rates. The language in section 2.3.4.2 rejected by the Arbitrator is a companion to this language at the end of section 2.3.4.1, and provides that SBC may true up to collect the difference between the transitional rates and the rates for the applicable alternative arrangement between the end of the transition period and the date the conversion requests are completed. Thus, AT&T's proposed section 2.3.4.2 ensures that SBC will be able to bill the full amount for post-transition services and will not suffer any monetary shortfall by being required to provide elements at the transitional rates past the end of the transitional period.

AT&T states that the language in section 2.3.4.1 and 2.3.4.2 is necessary to ensure that its customers are not negatively impacted by the conversion process. AT&T contends that it is also consistent with the principles behind the *TRRO*, in which the FCC, recognizing that the order was removing significant unbundling obligations that had formerly been placed on SBC, stressed the need for an orderly

¹⁴ *Id.*, p. 6.

transition for competitive carriers and their customers from UNEs to alternative facilities or arrangements.

AT&T asserts that the Arbitrator also erred in adopting SBC's proposed language at sections 3.3, 3.3.1 and 3.3.2. The language in sections 3.3 and 3.3.2 is identical, and provides as follows:

CLEC shall be fully liable to SBC Missouri to pay such pricing under the Agreement, including applicable terms and conditions setting forth interest and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the Agreement.

Section 3.3.1 is related, and provides:

Regardless of the execution or effective date of this Rider or the underlying agreement, CLEC will be liable to pay the Transitional Pricing for Mass Market ULS Element(s) and Mass Market UNE-P, beginning March 11, 2005.

AT&T claims that the language adopted in these sections is potentially inconsistent with other language that the Arbitrator adopted, which provides:

Regardless of the execution or effective date of this Rider or the underlying Agreement, CLEC agrees that the Transitional Pricing for all Affected Loop-Transport Element(s), shall apply beginning March 11, 2005, SBC Missouri will not bill AT&T for such rates, nor shall the difference in the Transitional Prices be due, prior to the execution of this rider.

In making this determination, the Arbitrator rejected SBC's proposed section 2.3.1, which is analogous to SBC's section 3.3.1, which the Arbitrator adopted.

AT&T states that the net effect of the Arbitrator's decision on sections 2.3.1, 3.3, 3.3.1 and 3.3.2 is that for Transitional Loop-Transport elements, although AT&T agrees to pay the transitional pricing for loop transport elements beginning March 11, 2005, SBC is not allowed to bill for the transitional rates until after the Rider has been executed. Because SBC cannot bill until after execution of the Rider, late charges and interest cannot apply until after that date. However, for transitional switching elements and UNE-P, AT&T is liable for the transitional rates beginning March 11, 2005, and SBC is entitled to impose late payment charges and interest beginning on that date. These conflicting results should be reconciled by adoption of AT&T's sections 3.3 and 3.3.1 and rejection of SBC Missouri's sections 3.3, 3.3.1 and 3.3.2.

Decision:

First, with respect to AT&T's comments regarding sections 2.3.4.1 and 2.3.4.2, the Commission finds that AT&T's assertion of error is that the Arbitrator has made a bad policy choice. That assertion of error is not within the scope permitted by Rule 4 CSR 240-36.040(20) and will be disregarded.

Second, with respect to AT&T's argument that its sections 3.3 and 3.3.1 should be adopted in place of SBC Missouri's sections 3.3, 3.3.1 and 3.3.2 in order to avoid an "arguable" inconsistency, the Commission finds that the provisions in question

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are indeed inconsistent. The Commission will modify the Report to provide that, regardless of the date of execution of the Rider or the date when SBC may bill, AT&T shall be liable for the transitional rates beginning March 11, 2005, and SBC shall be entitled to impose late payment charges and interest beginning on that date. SBC's proposed section 3.3.1 is adopted in place of AT&T's proposed section 2.3.1.

4. DCS Pricing:

AT&T Pricing Issue 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?

AT&T Pricing Issue 3: Should DCS rates be included in the ICA or should the ICA reference SBC's federal tariff for these rates?

Discussion:

AT&T states that the Arbitrator erred in determining that rates for DCS and DCS cross-connects need not be included in the ICA. AT&T explains that these issues are related to AT&T UNE Issue 20. AT&T states that, if the Commission reconsiders the Arbitrator's determination on AT&T UNE Issue 20, then pricing for DCS and related cross-connects should be included in the Schedule of Prices.

Decision:

The Commission finds that the Arbitrator did not err in his decision with respect to AT&T UNE Issue 20. For this reason, pricing for DCS and related cross-connects need not be included in the Schedule of Prices.

5. Voice Grade Dedicated Transport Cross-Connects:

AT&T Pricing Issue 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?

Discussion:

AT&T states that the Arbitrator erred in determining that rates for voice grade dedicated transport cross-connects need not be included in the ICA. The Arbitrator noted in Pricing Issue 1 that "SBC proposes no prices as the provision of these cross connects is not subject to Section 251(c)(3) as no finding of impairment has ever been made by the FCC on voice grade dedicated transport. Decision: The Arbitrator agrees with SBC for the reasons stated above." This finding, however, is inconsistent with the Arbitrator's finding on Pricing Issue 5, regarding whether rates for voice grade/DS0 dedicated transport should be included in the ICA. The Arbitrator, at page 17 of the Pricing Section of the Report, agreed with AT&T that rates for voice grade dedicated transport should be included. That finding is consistent with his ruling on a related UNE Issue. Given that the Arbitrator has determined that voice grade dedicated transport is a UNE, and that rates for it should remain in the ICA, AT&T argues that the Commission should reverse the inconsistent determination that voice grade dedicated transport cross-connects are not available under

the ICA. Voice grade dedicated transport is of little utility without corresponding cross-connects.

Decision:

The Commission concurs with AT&T. Because the Arbitrator determined that voice grade dedicated transport is a UNE and that rates for it should remain in the ICA, it follows that the ICA must also include rates for voice grade dedicated transport cross-connects. The Final Arbitrator's Report is modified in this respect. The parties shall incorporate the language proposed by AT&T in their ICA.

6. SBC's Section 6.1:

AT&T NIA Issue 10: Should interconnection trunks carry all 251(b)(5) traffic, including ISP bound and transit traffic, as well as intraLATA exchange traffic?

Discussion:

AT&T states that the Arbitrator erred by adopting only a part of SBC's proposed language that was found to be consistent with the Report. For this particular issue, as it does for other Network issues, the Arbitrator's Report points to the Commission's recently adopted Enhanced Record Exchange rules in 4 CSR 240-29.10 *et seq.* AT&T asserts that those rules cannot be applied in circumstances where they conflict with the Act. The Detailed Decision Matrix indicates that all of AT&T's proposed language for this issue is consistent with the Arbitrator's Report. The Matrix, however, also indicates that SBC's proposed language for Attachment 11, Part C, § 6.0, is consistent with the Report, but goes on to state that SBC's proposed language for Attachment 11, Part C, § 6.1 is not consistent with the Report. It is unclear to AT&T why the Report considers § 6.1 to be inconsistent with the Report. AT&T states that it would be an error to include § 6.0 in the ICA without also including § 6.1.

AT&T states that §§ 6.0 and 6.1 are companion paragraphs that operate in a reciprocal fashion. Section 6.0 addresses AT&T's routing of traffic to SBC and § 6.1 addresses SBC's routing of traffic to AT&T and from AT&T's perspective they impose reciprocal obligations. AT&T does not object to the inclusion of SBC's language for § 6.0 as long as § 6.1 is also included, since it would be discriminatory against AT&T to only include § 6.0. Therefore, the Arbitrator's Report should be corrected to also find that § 6.1 should be included in the ICA. AT&T thus alleges an inconsistency.

Decision:

The Commission concurs with AT&T. The Arbitrator's Report is modified to provide that the parties' ICA shall also include SBC's § 6.1, as follows:

SBC MISSOURI shall route Section 251(b)(5)/IntraLATA Toll Traffic destined for the AT&T Switch Center over a Local Interconnection Trunk Group from an SBC MISSOURI Local Tandem or when AT&T agrees to establish DEOTs over a direct end office Local Interconnection Trunk Group from an SBC MISSOURI End Office. SBC MISSOURI shall route Section

251(b)(5) Traffic and ISP-Bound Traffic destined for the AT&T Switch Center over a Local Only Trunk Group from an SBC MISSOURI Local Only Tandem Switch.

B. CharterFiberlink's Comments:

1. At what point must a CLEC establish additional POIs with a LATA?

Charter NIM Issue 1: (c) When CLEC selects a single POI, should this appendix contain language detailing the need for CLEC to establish additional POIs when CLEC reaches the appropriate threshold of traffic?

Discussion:

Charter states that the underlying issue here is the establishment of physical points of interconnection ("POIs") where Charter and SBC will physically link up their networks in order to exchange traffic.¹⁵ The Arbitrator held – correctly, in Charter's view — that CLECs may establish a single, LATA-wide POI to exchange all traffic with SBC.¹⁶ He also noted that, under 47 U.S.C. § 251(c)(2), interconnection must be "technically feasible."¹⁷ Charter states that it follows that SBC may reasonably require an additional POI if SBC can show that it is technically infeasible to keep using the POI or POIs already in place.

Charter states that, given the Arbitrator's decision, it follows that Charter's proposed contract language is to be preferred. However, the Detailed Matrix attached to Section V of the Arbitrator's Final Report states that it is SBC's language that is more consistent with the Arbitrator's substantive rulings. Charter urges the Commission to correct this inconsistency.

Decision:

The Commission concurs with Charter that the Detailed Matrix is inconsistent with the Arbitrator's stated decision. The Arbitrator's Final Report is modified to state that the parties shall adopt Charter's proposed language.

C. TheCLEC Coalition's Comments:

1. Maintenance and repair of commingled arrangements:

¹⁵ The parties' competing contract language on this point is set out in the Charter-SBC NIM DPL, Issue No. 1(c) at pp. 2-3.

¹⁶ See Final Arbitrator's Report at § V (Interconnection) at pp. 6 & 8, Case No. TO-2005-0336 (rel. June 21, 2005) (hereinafter *Final Arbitrator's Report*). See also In the Matter of Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, FCC 01-132 (released April 21, 2001) at ¶ 112 (footnote omitted) (an ILEC "must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.")

¹⁷ See *Final Arbitrator's Report* at § V (Interconnection) at p. 3.

CLEC Coalition UNE Issue 68: (1) Should references to Commingled Elements be included in this Attachment? (2) Should the Attachment include an express obligation for SBC to conform with any performance metrics the Missouri Commission may order during the term of the Agreement?

Discussion:

The Coalition states that the Arbitrator approved the Coalition's proposed language in Sections 1.1 and 3.1, but apparently rejected it in Section 2.1. The Coalition states that this appears to be an inadvertent error that should be corrected in the Commission's order through a clarification of the Final Arbitrator's Report affirming that the CLECs' proposed language is approved for Section 2.1.

Decision:

The language proposed by the Coalition is as follows (the underlined portions are those objected to by SBC):

2.1 SBC MISSOURI will provide maintenance for all Unbundled Network Elements Combinations and Commingled Elements ordered under this Agreement at levels equal to the maintenance provided by SBC MISSOURI in serving its end user customers, consistent with Attachment 6 UNE, Section 2.4.1, and will meet the requirements set forth in this Attachment. Such maintenance requirements will include, without limitation, those applicable to testing and network management. The maintenance to support these services will be provided in a manner which meets the performance metrics provided for in Attachment 17 or any MISSOURI Commission-ordered performance measures.

The language proposed by SBC and selected by the Arbitrator is as follows (the language in bold is that objected to by the Coalition):

2.1 SBC MISSOURI will provide maintenance for all **Lawful** Unbundled Network Elements **and Lawful** Combinations ordered under this Agreement at levels equal to the maintenance provided by SBC MISSOURI in serving its end user customers, consistent with Attachment 6 UNE, Section 2.4.1, and will meet the requirements set forth in this Attachment. Such maintenance requirements will include, without limitation, those applicable to testing and network management. The maintenance to support these services will be provided in a manner which meets the performance metrics provided for in Attachment 17

Having considered the foregoing, the Commission concurs with the Coalition. Its proposed language is consistent with the other decisions made by the Arbitrator and his rejection of it here seems to be an error. The Final Arbitrator's Report is hereby modified and the parties are directed to include the Coalition's proposed version of Section 2.1 in their ICA.

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2. Billing for unbundled switching where billing is based on usage.

CLEC Coalition UNE Issue 58: Given the TRRO, should CLEC be allowed to purchase UNE switching in this ICA?

Discussion:

The Coalition explains that the Arbitrator concluded that SBC must provide the 271 checklist items of local switching, local loops and local transport in the parties' ICA, and the decisions in his Report regarding access to databases, AIN and other services associated with unbundled local switching are consistent with that determination. That is, the terms and conditions governing the provision of all the associated services that make CLECs' access to 271 unbundled local switching meaningful will be part of this agreement.

However, the Coalition states, in what appears to be an inadvertent error, the Final Arbitrator's Report rejects the Coalition's language set forth in Section 2.3 of the Appendix Pricing to UNE Attachment 6 that states how SBC will bill CLECs for such unbundled switching when the rates are based on minutes-of-use ("MOU"). The Arbitrator, through his resolution of CLEC Coalition UNE Issue 1, determined Coalition UNE Issue 58 in its favor as well. For this reason, the Coalition states that the disputed language shown below should be retained in the Appendix in order to provide complete terms for the billing of unbundled local switching:

Where rates will be based on minutes of use (MOU), usage will be accumulated at the end office and are rounded to the next higher minute per monthly billing cycle. In the long term usage will be measured beginning when the facilities are seized (excluding network failures) and ending when the facilities are released. SBC MISSOURI is currently unable to measure busy/don't answer (by/da), but SBC MISSOURI intends to develop such capability. SBC MISSOURI will provide CLEC not less than 30 days notice when SBC MISSOURI begins to measure by/da. No related true up will occur.

The Coalition urges the Commission to correct this apparent error as a clarification to the Final Arbitrator's Report.

Decision:

The Commission concurs with the Coalition. Its proposed language is consistent with the other decisions made by the Arbitrator and his rejection of it here is an error. The Final Arbitrator's Report is hereby modified and the parties are directed to include the Coalition's proposed version of Section 2.3 in their ICA.

3. Restrictions on equipment used by CLECs:

CLEC Coalition UNE Issue 37: Is a general statement referring to regulatory requirements helpful to understanding?

Discussion:

The Coalition states that a review of the detailed matrix accompanying the Arbitrator's Report revealed that one important issue was not decided. The Coalition requests clarification with respect to the following language proposed by SBC and rejected by the Coalition:

2.35 CLEC will connect equipment and facilities that are compatible with the SBC MISSOURI Unbundled Network Elements and will use Unbundled Network Elements in accordance with the applicable regulatory standards and requirements referenced in Section 2.20.

In its Brief, SBC states that the Commission should adopt its proposed language (set out above), which requires CLECs to connect equipment and facilities compatible with SBC Missouri's UNEs and to use UNEs in accordance with the applicable regulatory standards referenced in the ICA, because SBC Missouri's position is reasonable in that it can only support equipment that currently exists and is approved for use within SBC Missouri's network. SBC contends that it would be unreasonable to require SBC Missouri to be responsible for installing, provisioning, and maintaining equipment that is not established in its network.¹⁸ Moreover, although the Coalition objects to SBC Missouri's proposal, it provides no competing language.

The Coalition did address this issue in its Brief. However, in its Position Statement, the Coalition objected that SBC's proposed language is "vague" and "general" and "raises more questions than [it] answers." For example, the Coalition asks rhetorically, "What is meant by compatible? What is meant by use in this context?" The Coalition states that, if SBC means that CLEC's equipment will meet FCC rules or industry requirements set by testing organizations, then it agrees that that is what should be here. Otherwise, the Coalition asserts, SBC's language only creates confusion for the reader without adding anything concrete and potentially allows SBC to declare some equipment or facility that a CLEC has connected, or is using, to be violating the parties' agreement. The Coalition requests that the Commission rule on this disputed issue.

Decision:

The Commission concurs with SBC and thus modifies the Final Arbitrator's Report to direct the parties to include SBC's Section 2.35 in their ICA. The Commission does not find the provision to be either vague or confusing and is of the opinion that it is indeed reasonable as argued by SBC.

4. Rates:**(A) Rate Increases for Rural UNE Loops:**

CLEC Coalition Pricing Issue A 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?

¹⁸ Hatch Direct, p. 42.

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Discussion:

The Coalition states that the Arbitrator rejected the CLEC Coalition's proposal that the ICA maintain the UNE rates the parties have been operating under during the term of the M2A. The CLEC Coalition urges the Commission to reconsider this decision because it is contrary to Commission precedent and because approval of SBC's unsupported rate increases will have a very deleterious effect on competition in Missouri, particularly with regard to 2-wire analog (DS0)¹⁹ voice-grade loops in Zones 2 and 3 in rural Missouri ("Rural UNE Loops").

The Coalition points out that, in this arbitration, SBC did not present cost studies justifying any rate changes, much less rate increases for Rural UNE Loops. SBC states that it will no longer offer current prices because they are the result of its M2A "voluntary" commitments. As the following chart taken from the Coalition's Comments demonstrates, the impact of SBC's proposals is particularly evident in the rural rates where prices will increase by 11% in Zone 2 and 69% in Zone 3.

Retail Rate Group	UNE Rate Zone	# of access lines	Rates Under Arb. Decision	Current M2A Rates	% Increase
D	1	> than 230,000	\$12.71	\$12.71	0%
B	2	5,000 - 59,999	\$20.71	\$18.64	11%
A	3	0 - 4,999	\$33.29	\$19.74	69%
C	4	60,000 - 229,000	\$18.23	\$16.41	11%

SBC claims that these much higher rates meet TELRIC standards because they were approved by the Commission in cost proceedings conducted just after the passage of the 1996 Act.

The Coalition states that, in a prior case, the Commission faced the question of whether to apply M2A UNE rates in the place of rates based on similarly-outdated SBC cost studies. In a 2001 AT&T arbitration that occurred after the M2A was in place, SBC urged that the Commission apply pre-M2A rates based on outdated cost studies that were of "1996 vintage."²⁰ The Commission contrasted the outdated rates proposed by SBC with the M2A rates, which were "the product of a lengthy proceeding and close scrutiny."²¹ The Commission concluded that it was

¹⁹ DS0 voice-grade loops were not declassified as UNEs under § 251 in any U.S. market by the FCC's TRRO rulings. DS0 loops remain a fundamental building block that CLECs using their own switches need to reach residential and small business customers. Therefore, under governing law, DS0 loops, whether in rural or urban zones, must be offered at TELRIC rates.

²⁰ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (Arbitration Order, issued June 14, 2001) at 14.

²¹ *Id.*

appropriate to apply M2A rates in the AT&T-SBC agreement, although they had not been litigated in the parties' arbitration proceeding. The Commission expressed confidence in the M2A rates as being "compliant with both the Act and the FCC's regulations," and noted that the Commission "has already determined that [the M2A] complies with all of the standards applicable to interconnection agreements, including the 14-point checklist in Section 271."²² Given the absence of current cost studies filed by either SBC or AT&T, the Commission adopted the M2A rates.

Similarly, the Coalition points out, in this case SBC has not presented cost support for departing from the M2A rates. While SBC claims certain rates were "voluntary," SBC ignores the FCC's findings in the Missouri 271 proceeding. The FCC there held that rates such as the Rural UNE Loop rates had to be reduced in order for SBC to attain interLATA long distance entry. As this Commission noted in the AT&T-SBC arbitration order cited above, the FCC was troubled by the fact that "[r]ecurring charges in Missouri are two to six times those in Texas, Kansas, and Oklahoma."²³ When SBC sought long distance authority, it lowered the rates to the current levels. Now, SBC is seeking to raise the same rates back to the levels the FCC found unreasonable, without presenting updated cost support to show that the rates are compliant with TELRIC standards. The Coalition urges the Commission to follow its precedent and reject SBC's unsupported changes to the M2A rates.

The Coalition further states that, if the Commission is reluctant to maintain the *status quo*, the Coalition urges the Commission to reconsider the Arbitrator's ruling approving price increases specifically for the Rural UNE Loop rate. At the current M2A rural prices, Missouri CLECs like Big River Communications and Socket Telecom have been able to offer facilities-based alternatives to Missouri residential and small business customers. CLECs have installed their own switches, connected them to Rural UNE Loops to reach residential and business customers, and thereby made competitive alternatives available to rural customers who otherwise would not have choices for their telecommunications services. Without the availability of affordable voice-grade UNE loops, such service offerings simply are not financially viable.

The Coalition contends that SBC offered the M2A Rural UNE Loop rates as part of its effort to enter the Missouri interLATA long distance market, an effort that required SBC to demonstrate that the Missouri local exchange market was irreversibly open to competition. However, the Coalition points out, now that SBC is not only dominating the Missouri interLATA market, but is on the verge of absorbing its largest competitor — AT&T, SBC is moving to raise the UNE rates that have made limited local competition possible for rural residents in Missouri. The Coalition argues that SBC should, at a minimum, be held to the commitment it made in the M2A, which has yielded tangible results for rural areas in Missouri.

Decision:

In its Brief, SBC stated that its proposed rates are generally those contained in prior arbitrations or the M2A, but modified (1) to eliminate "certain voluntary offerings made in the M2A that are not required under the Act," (2) to remove certain

²² *Id.*

²³ *Id.* at 11.

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elements that have been declassified by the FCC in its *TRO* and *TRRO* decisions since the M2A was adopted, and (3) to add rates for certain services which were not part of the M2A but which were negotiated by the parties. Nowhere in this discussion did SBC candidly advise the Arbitrator of the size or effect of the rate changes it proposed. Indeed, the scale and impact of these rate changes has only become apparent with the filing of the Coalition's Comments containing the chart reproduced above.

The Commission will modify the Final Arbitrator's Report and direct the parties to use the M2A rates in their ICA. As the Coalition correctly argues, SBC has utterly failed to support these rate increases with current cost studies. In the absence of such studies and an adequate opportunity to review them, this Commission will not approve rate increases.

(B) Interim Rates for Section 271 UNEs:

CLEC Coalition Pricing Issue A 2: Should those elements declassified by the FCC be contained in a 251 Pricing Schedule?

CLEC Coalition Pricing Issue A 3: Should the Pricing Schedule be limited to network elements classified as UNEs under Sections 251 and 252?

Discussion:

The Coalition states that the Final Arbitrator's Report correctly held that unbundled elements required by the § 271 competitive checklist ("§ 271 UNEs") must be included in the M2A successor interconnection agreements. The Coalition further states that the Arbitrator also properly held that the pricing standard for § 271 UNEs is a "just and reasonable" standard rather than a TELRIC standard. However, until the Commission determines what constitutes a "just and reasonable" rate for § 271 UNEs, the industry will need an interim rate for checklist items that are no longer available at TELRIC rates due to declassification under the *TRRO*, that is, switching, loop, and transport elements that have been declassified under § 251 but remain available under the new price standard under § 271.

The CLEC Coalition's proposed contract language contemplated that the interim rates be established at TELRIC levels until the Commission can set a permanent rate. The Arbitrator rejected this proposal, apparently finding it inconsistent with the recommendation that all § 271 UNEs be priced at "just and reasonable" rather than TELRIC rates.²⁴ The Arbitrator also rejected SBC's proposed language, which did not include any rate for § 271 UNEs.

The Coalition sponsored an interim rate compromise proposal in testimony that was not reflected in the Final Arbitrator's Report. In rebuttal testimony, Ms. Mulvany Henry of Birch Telecom testified on behalf of the Coalition:

²⁴ Final Arbitrator's Report, Attachment III.A, Part 1, Detailed Language Decision Matrix, CC UNE Issue 1, proposed Section 1.2.6 (Coalition) and 2.18.6.2 (SBC).

Specifically, we ask the Commission to clearly recognize that the only difference between § 271 and § 251 elements . . . is the applicable price. Although SBC is not required to charge TELRIC-based rates, it is also not permitted to charge rates that exceed just and reasonable levels. The arbiter of the appropriate price remains the Missouri Public Service Commission. **Because there is no information to establish such rates in this phase of the proceeding, we recommend that the Commission adopt the transitional rates adopted by the FCC as interim § 271 rates until it can arbitrate this issue in the next phase of the proceeding.** . . . Section 1.2.6 as proposed by the Coalition provides for these network elements to be priced at TELRIC rates until the Commission sets new “just and reasonable” rates. The Coalition concurs in my recommendation that the Commission adopt the transitional rates on an interim basis.²⁵

The Coalition contends that this proposal recognizes that the rate for § 271 UNEs will be higher than current TELRIC rates. It adopts, strictly on an interim basis, the higher transitional UNE prices that the FCC adopted for declassified § 251 UNEs. If the transitional rates adopted by the FCC are adopted, it will provide the parties a rate at which § 271 UNEs may be purchased via the ICA while permanent just and reasonable rates are being determined.²⁶

Rather than leave the parties no guidance on the appropriate interim § 271 UNE rate to be included in the M2A successor ICAs, the Coalition urges that the Commission adopt the compromise proposal the Coalition offered in record testimony and in its post-hearing brief. Adoption of an interim rate will provide certainty and encourage SBC and the CLECs to expeditiously engage in negotiations toward establishing permanent rates for § 271 UNEs. Unless an interim rate is established and CLECs can actually purchase § 271 UNEs out of their ICAs, SBC’s obligation to offer § 271 UNEs under the M2A successor agreements will be illusory. This is certainly not the outcome contemplated by the Final Arbitrator’s Report.

Decision:

The Arbitrator’s decision with respect to both CLEC Coalition Pricing Issues A-2 and A-3 was that “The Arbitrator agrees that the ICA must include prices for § 271 UNEs.” However, the Arbitrator failed to specify what those rates would be. SBC

²⁵ Mulvaney Henry UNEs Rebuttal, at 21-22 and n.38 (emphasis supplied).

²⁶ The Coalition’s interim rate proposal was also discussed in the Coalition’s post-hearing brief: “[T]he CLEC Coalition interim rate proposal for switching, and all other network elements ‘delisted’ under the *TRRO* is the higher rate approved for the *TRRO* Transition Period by the FCC. If the Coalition proposal is accepted in its entirety, rates for § 271 checklist switching will increase and will stay at that level until the parties agree to a § 271 ‘just and reasonable’ rate or the Commission approves an arbitrated § 271 rate.” CLEC Coalition Post-Hearing Brief, at 37 (referencing Ms. Mulvaney Henry’s testimony).

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offered no rates because its view is that these ICAs should not contain prices for § 271 UNEs. Likewise, the Coalition's original suggestion that TELRIC rates be continued is not appropriate given that the appropriate standard is now "just and reasonable." However, the Commission concurs that the Coalition's compromise position – rates patterned on the FCC's transition period rates for declassified UNEs – constitutes a suitable interim rate structure for § 271 UNEs. The Final Arbitrator's Report is so modified and the parties are directed to use such rates in their ICAs.

5. Types of Section 251(b)(5)/ IntraLATA Toll Traffic:

CLEC Coalition NIA Issue 5: (a) Should a non-251 (b) or (c) service such as Transit Service be negotiated separately? (b) If not, is it appropriate to include transit traffic in the definition of Section 251(b)(5)/IntraLATA Toll Traffic?

CLEC Coalition NIA Issue 6: Should terms and conditions relating to Section 251(a) Interconnection be addressed in a separate out-of-exchange appendix.?

Discussion:

The Coalition states that it proposed the following language, which the Arbitrator approved twice²⁷ and rejected once²⁸ in the Detailed Language Decision Matrix:

"Section 251(b)(5)/IntraLATA Toll Traffic" shall mean for purposes of this Attachment, (i) Section 251(b)(5) Traffic, (ii) ISP-Bound Traffic, (iii) Optional EAS traffic, (iv) FX or virtual FX traffic (that may also fall under (i), (ii), or (iii)), (v) Transit Traffic, (vi) out of area traffic, (iii) IntraLATA Toll Traffic originating from an end user obtaining local dialtone from CLEC where CLEC is both the Section 251(b)(5) Traffic and intraLATA toll provider, and/or (iv) IntraLATA Toll Traffic originating from an end user obtaining local dialtone from SBC-MISSOURI where SBC-MISSOURI is both the Section 251(b)(5) Traffic and intraLATA toll provider.

The Coalition explains that the single rejection of the Coalition's language in the OE-LEC Decision Matrix appears to reject the reference to out-of-area traffic in the same way that the Arbitrator rejects SBC's proposed OE-LEC Attachment. The Coalition supports the Arbitrator's decision that the separate OE-LEC attachment is not required, but the reference to out-of-area traffic should remain in the definition of Section 251(b)(5)/IntraLATA Toll Traffic. The fact that the Coalition members do not support SBC's OE LEC document does not change the fact that out-of-area traffic will continue to be exchanged between the parties under the ICA and is properly included in the definition.

²⁷ See Attachment Transit. A, CC NIA 5a and 5b and Attachment V.A. Part 2, CC NIA 5.

²⁸ See Section XIV.A, OE-LEC issues, CC NIA 6.

In its Brief, SBC Missouri asserted that its statutory obligations to offer most Sections 251/252 services is limited to those areas in which it is the incumbent LEC and that the ICA thus does not cover services offered when the parties wish to exchange traffic in the areas where SBC Missouri is not the incumbent LEC. SBC Missouri does not believe it is appropriate to address Out-Of-Exchange-LEC ("OE LEC") traffic in the interconnection appendix because the interconnection appendix applies only to SBC Missouri's incumbent territory. It therefore offered CLECs the OE-LEC appendix to govern this type of Out of Exchange traffic.²⁹

Decision:

The Arbitrator rejected SBC's argument that its interconnection obligation is limited to its incumbent territory and also rejected SBC's proposed OE-LEC Appendix. However, the Commission concurs with the Coalition here because the fact is that the parties will continue to exchange out-of-area traffic. Its definition is thus appropriately included in the ICA and the Final Arbitrator's Report is so modified.

6. The Metropolitan Calling Area:

CLEC Coalition NIA Issue 2: Is a "Metropolitan Calling Area" considered a "Local Calling Area?"

Discussion:

SBC states that "MCA Traffic" is traffic exchanged throughout the "Metropolitan Calling Area", a calling scope plan established by Public Service Commission Orders in Case No. TO-92-306 and Case No. TO-99-483. Calls within an MCA are rated as "local" to an end-user and the call is § 251(b)(5) Traffic based on the calling scope of the originating party pursuant to the MCA Orders. Either party providing MCA service shall offer the full calling scope prescribed in Case No. TO-92-306 without regard to the identity of the called party's local service provider. For compensation purposes, MCA Traffic shall be exchanged on a bill-and-keep, intercompany compensation basis as provided in the Intercarrier Compensation Appendix.

SBC Missouri states that it does not object to the MCA as defined by the Commission, nor the rating of traffic to an end-user, nor the inter-company compensation due for traffic within the MCA. However, an "MCA" is *not* the same as a "Local Calling Area" for a very important reason. A "Local Calling Area", for purposes of this Agreement and Attachment, is limited to those areas in which SBC Missouri is the incumbent local exchange provider. Should a CLEC wish to operate outside SBC Missouri's incumbent territory — even when the territory is within the same MCA — the terms of such OE-LEC traffic must be established. Consequently, there is a very real difference between an MCA and a Local Calling Area and SBC Missouri proposes that the definition of Local Calling Area in the ICA should reflect this distinction.

²⁹ McPhee Direct, p. 65-66.

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The Coalition states that its proposed language only addresses those situations in which a CLEC is providing service in an MCA. SBC's proposed language has the effect of requiring a CLEC to establish a POI within SBC's network even if the CLEC only offers service in another incumbent LEC's territory within the LATA but competes with SBC in another LATA.

The Coalition states that, in previous cases concerning the MCA, the Commission defined MCA calls as local calls, ruled that inter-company compensation must be bill-and-keep between companies, and that the calling scope and dialing pattern did not vary based upon the identity of the called party's local service provider. It is simply a Local Calling Area that involves multiple LECs. The present M2A agreement specifically states, "For purposes of interconnection and inter-company compensation, "Exchange Area" shall be defined consistent with SWBT's Missouri Retail Tariffs, except that the entirety of a Metropolitan Calling Area shall be considered a single Exchange Area." The M2A also includes provisions that prohibited Transit Charges from being applied to MCA traffic.

Decision:

The Arbitrator failed to address this issue. The Commission determines that the parties' ICA shall treat this issue in the same manner as did the M2A.

7. PSTN-IP-PSTN And IP-PSTN Issues:

CLEC Coalition ITR Issue 5a: What is the proper routing, treatment, and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

CLEC Coalition IC Issue 15a: Should reciprocal compensation arrangements apply to Information Services traffic, including IP Enabled Services Traffic?

CLEC Coalition IC Issue 15b: What is the proper routing, treatment, and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

Discussion:

The Coalition states that the "PSTN-IP-PSTN" and "IP-PSTN" issues relate to intercarrier compensation for traffic that traverses both the traditional "Public Switched Telephone Network" ("PSTN") as well as advanced networks based on "Internet Protocol" ("IP"). The Coalition urged that the Arbitrator not accept SBC's contract proposal on the Coalition issues listed above related to PSTN-IP-PSTN and IP-PSTN traffic, but the Arbitrator nonetheless did accept SBC's language. The Coalition requests clarification on one part of the Arbitrator's ruling on these issues, that dealing with IP-PSTN traffic compensation.

The Arbitrator ruled in favor of SBC's proposed contract language that would subject both PSTN-IP-PSTN traffic and IP-PSTN traffic to switched access charges in all circumstances. The Coalition understands that the Arbitrator based the

decision regarding switched access compensation for PSTN-IP-PSTN traffic on the FCC's order in the AT&T "Phone to Phone" petition. The FCC addressed compensation for a specific form of interstate interexchange traffic in the AT&T "Phone-to-Phone" IP order.³⁰ The AT&T IP Order was specifically limited to the type of service offered by AT&T and the FCC stressed that it was not attempting to resolve compensation for IP-PSTN traffic in its ruling. As the Arbitrator recognized, several additional issues related to compensation for IP enabled traffic are being addressed in the pending IP-enabled services rulemaking.³¹

In the ruling on the intercarrier compensation issue designated "MCI RC 15," the Arbitrator also addressed compensation for IP-PSTN traffic.³² On that issue, the Arbitrator ruled in favor of MCI's proposal. MCI argued that, unlike PSTN-IP-PSTN traffic, "IP-PSTN traffic, on the other hand falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates."³³

The Coalition requests clarification because the ruling on the Coalition's issue involving IP-PSTN compensation approved SBC-proposed language that would apply switched access to IP-PSTN traffic. The ruling on the MCI issue, however, identifies reciprocal compensation "instead of switched access" as the appropriate compensation mechanism for IP-PSTN traffic. If reciprocal compensation is to be applied to such traffic in the MCI-SBC ICA, it should be applied to the ICA approved for companies in the CLEC Coalition as well. While the Coalition would prefer, as discussed in our testimony and post-hearing brief, that the Commission defer a decision on IP-PSTN compensation until the FCC has definitively ruled, if the Commission chooses to address the issue here, it should be addressed in a consistent manner.

Decision:

As asserted by the Coalition, the Arbitrator held with respect to MCI RC Issue 15 that "[t]he IP-PSTN traffic, on the other hand falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates." The Commission agrees that this traffic should be treated consistently and the Final Arbitrator's Report is thus modified to provide that the Coalition's ICA will also provide that IP-PSTN traffic be charged under the reciprocal compensation regime rather than be subject to access charges.

8. Should the terms, conditions and price of interconnection facilities be included in the ICA or should the ICA refer to SBC's access tariff?

³⁰ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order (rel. April 21, 2004) ("AT&T IP Order").

³¹ See *In the Matter of IP-Enabled Services*, WC Docket 04-36, Notice of Proposed Rulemaking (rel. March 10, 2004).

³² Final Arbitrator's Report, Section VI, – pp 21-22.

³³ *Id.* at 22.

CLEC Coalition E-911 Issue 3: The language in the ITR addresses only 911 trunk interconnections. There is no language specific to 911 in the NIM.

Discussion:

The Coalition states that the Arbitrator agreed with SBC that the "Coalition's proposed language incorrectly mixes the concepts of facilities and trunking. Section 2.3.2 of the E-911 Attachment merely states that SBC will provide the facilities required to establish the interconnection to the SBC 911 selective routers 'as specified in the State access tariff.'" The Coalition contends that the Arbitrator erred on this issue by failing to determine that the interconnection facilities that enable the CLEC to provide 911 service to its customers are interconnection facilities as set forth in §§ 251(a) and (c) of the Act that must be made available at cost-based rates. Consequently, interconnection facilities upon which 911 trunks ride must be available at cost-based rates.

In its testimony and during the hearing, the Coalition states that SBC contended that 911 trunks are ancillary trunks and that 911 traffic is not the mutual exchange of telecommunications.³⁴ SBC opined that, because 911 is not actual interconnection of two carriers for the exchange of traffic, CLECs should purchase facilities from the access tariff rather than at cost-based prices. The Coalition asserts that SBC is wrong at both the state and federal levels because 911 services are part of local service and 911 facilities are used to interconnect the parties' networks. At the state level, Missouri statutes and rules include 911 service as part of basic local telecommunications service.³⁵ SBC also provides Universal Emergency Number Services (9-1-1) to 911 entities as a local service via its General Exchange Tariff, P.S.C. Mo. No. 35. 911 entities purchase these services for the ability to receive emergency calls from all telecommunications customers, regardless of which company provides telecommunications services to that customer. At the federal level, the FCC addressed 911 interconnection in a recent Order requiring VoIP providers to provide 911 service to their customers.

We note that the Commission currently requires LECs to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions that are consistent with the requirements of this Order, including NENA's I2 or wireless E911-like solutions.³⁶

³⁴ Hamiter Direct, at 67 and Tr. at 429-30: "But for the purpose of whose end users are benefiting from this, you know, we see that your meet point trunk groups, your 911 trunk groups, et cetera are solely for the benefit of your customers, you know, they're really not going to interconnect with us over those trunk groups."

³⁵ Section 386.020(4)(c), RSMo Supp. 2004.

³⁶ WC Docket No. 04-36, WC Docket No. 05-196 *In the Matters of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking at ¶ 38 (footnote omitted).

Contrary to SBC's assertions, 911 facilities are interconnection facilities under both state and federal law and CLECs are therefore entitled to lease 911 facilities at cost-based rates.

The Coalition further states that an additional problem arises with the Arbitrator's approval of a state access tariff as the source for pricing of interconnection facilities. SBC's intrastate access tariffs are an insufficient source from which to purchase facilities for the provision of all 911 services in Missouri. For example, the selective router that provides service to more than thirty counties in Western and Central Missouri is located in Kansas City, Kansas. CLECs providing service to Missouri exchanges served by the Kansas router may not order from SBC's intrastate special access tariff to obtain facilities to the selective router located in Kansas. Unbundled network elements and interconnection facilities, however, may be purchased from SBC on an interstate basis, which would allow Missouri CLECs to obtain facilities to access the Kansas selective router to serve Missouri customers.

The Coalition points out that the Arbitrator seemed generally reluctant to make any change to the current M2A 911 process.³⁷ However, requiring that CLECs purchase 911 facilities from SBC's State access tariff is a change from the current M2A that CLECs believe will result in substantially higher costs and possible pass-through of costs to the PSAPs. Under the M2A, the current \$85.00 per DS0 rate specified in Attachment E-911 MO (M2A) includes both the trunk and the facility charge. Under the Arbitrator's ruling, CLECs must continue to pay this existing rate as a trunk charge plus purchase underlying facilities under the access tariff. This is therefore a major departure from the current process in the M2A.

Under the published rates in SBC's intrastate special access tariff, the rate for the transport facility will be minimum of \$450 per month, even when the CLEC is located in the same central office as the selective router and needs nothing more than a cross-connect. Even worse, if the competitive classification provisions contained in pending state legislation that is expected to take effect in August are found to apply to special access, SBC will be free to set these rates at whatever level it chooses. Although no CLEC has tariffed charges for providing 911 service to PSAPs, the Coalition contends that the specter of unrestricted SBC prices and of no alternative providers for facilities to SBC's selective routers may cause CLECs to pass through increased 911 facility charges to the state's PSAPs.

Decision:

The Coalition did not bother to address this issue in its Brief or in testimony. The only assistance it offered the Arbitrator on this point was the following Position Statement: "The Interconnection Agreement itself is a better place for the parties to have reliable, consistent references for information. Tariff information is subject to change with little notice." Consequently, the Arbitrator was unable to foresee the significant adverse economic impact that would result from the position he adopted.

³⁷ See, e.g., Final Arbitrator's Report, Section IX at 3.

The Commission is of the opinion that the Arbitrator was right to be reluctant to depart from the M2A. The Commission considers that that is also the right answer to this issue. The Final Arbitration Report is modified to require that the parties' ICA incorporate the language of the M2A on this point.

D. MCI's Comments:

1. Entrance facilities:

MCI NIM Issue 13: Should facilities used for 251(c)(2) interconnection be priced at TELRIC rates?

SBC's Statement of the Issue: Should a non-section 251/252 service such as Leased Facilities be arbitrated in this section 251/252 proceeding?

Discussion:

MCI states that the Final Arbitrator's Report is inconsistent in that the Arbitrator ruled that "entrance facilities are part of SBC Missouri's network. To the extent CLECs desire to obtain interconnection facilities described above, they may do so at cost-based (TELRIC) rates."³⁸ However, the attached Detailed Language Decision Matrix states that "MCI's language is not consistent with the Arbitrator's Report."³⁹ MCI states that the decision column of that matrix should reflect that MCI's proposed language is most consistent with the Arbitrator's Report.

Decision:

The Commission concurs with MCI. The Detailed Matrix does not accurately reflect the Arbitrator's decision. The Commission will therefore modify the Arbitrator's Final Report and direct the parties to adopt MCI's proposed language.

E. Navigator's Comments:

1. Who should bear any costs arising from assignments, mergers, name changes, and the like?

Navigator GTC Issue 6: Should CLEC be responsible for the cost associated with changing their records in SBC's systems when CLECs enter into an assignment, transfer, merger or any other corporate change?

Discussion:

Navigator contends that the Arbitrator overlooked its GTC Issue No. 6, set out above. The Arbitrator listed this DP under his GT&C Issue 3(b).

Navigator states that the Arbitrator noted that it raised the issue of charges imposed by SBC for changing OCN/ACNA information. As noted by the Arbitrator, Navigator does not object to compensating SBC for those functions, but does object

³⁸ Final Arbitrator's Report, Section V, page 16.

³⁹ Attachment V, Part 1, Detailed Language Decision Matrix, page 57.

to SBC's practice of imposing a separate charge for each resale line while imposing only a single charge for an entire block of UNE lines. The Arbitrator quoted Navigator witness LeDoux: "As a substantial number of our lines are resale, this practice could have a substantial impact on Navigator. We simply believe that SBC should impose the same block charges for both UNE and resale lines."⁴⁰

The Arbitrator found that SBC may impose a reasonable charge for database corrections, but he did not address the issue raised by Navigator, that is, disparate charges for UNE and resale lines.⁴¹ Navigator states that it does not seek a "free ride," that is, the right to demand that SBC impose no charge for performing these functions. Rather, Navigator asks the Commission to find that the charges be imposed in a nondiscriminatory fashion.

Although SBC addressed, in its post-hearing brief, the issue of requiring CLECs to pay for costs incurred in changes of CLEC company identifiers, SBC did not address Navigator's discriminatory charges issue.⁴² Navigator contends that SBC provided no testimony to justify this practice. For this reason, Navigator urges the Commission to find that its language, which would eliminate the practice, should be incorporated into the ICA.

SBC's position is that the CLECs must be responsible for the costs associated with any assignments, transfers, mergers, acquisitions, or other corporate changes.⁴³ ACNAs and OCNs, which are assigned by industry agencies such as Telcordia and NECA, appear on each end user account and circuit. These codes are used in all ILECs' directory databases, network databases (LMOS, TIRKS, INAC, RCMAC, etc.), and billing systems to identify inventory and appropriately bill the services provisioned on each service order. Any change to a company code requires service order activity on each and every end user account and circuit in order to update the multitude of systems. Not only are these company codes utilized within the ILEC but also throughout the industry in such databases as the LERG, which allows the industry as a whole to properly bill routed calls. When a company code change is associated with a transfer of assets, it is no different than a CLEC-to-CLEC migration that requires a service order to be submitted by a winning Carrier.

Decision:

Navigator's proposed language states: "For resale or any other products not billed in CABS, to the extent a record order is available, a record order charge will apply per **Resale BAN**,"⁴⁴ while SBC's proposed language states: "For resale or any other products not billed in CABS, to the extent a record order is available, a record order charge will apply per **end user record**." The difference lies only in the final words of this sentence.

SBC's witness, Suzette Quate, testified: "To implement an OCN/ACNA change for a CLEC, SBC Missouri must, at the CLEC's direction, update the accounts of

⁴⁰ Report, Section 1(A), p. 22.

⁴¹ Report, Section 1(A), p. 23.

⁴² SBC's Brief, pp. 13-15.

⁴³ SBC's Statement of Position, Navigator's GT&C DPL, Issue 6.

⁴⁴ "BAN" means Billing Account Number.

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each of the CLEC's end users in the SBC Missouri databases to reflect the correct company name, OCN/ACNA, or other CLEC company identifier."⁴⁵ Navigator's witness, LeDoux, testified in turn: "SBC imposes a single charge for changing the Billing Accounts Number (BAN) for UNE lines billed in CABS, but imposes a per-line charge for resale lines. We believe that this is discriminatory, and there is no business reason to justify this practice."⁴⁶

It appears from the testimony that every resale line end-user account must be modified in the event of an OCN/ACNA change, while the testimony is silent as to UNE lines. Navigator, however, does not challenge the treatment of UNE lines, it challenges the per line charge levied on resale lines. The record shows that SBC incurs per-line costs for resale lines because each end-user record must be changed. For this reason, the Commission concludes that SBC's language is preferable. The parties are directed to incorporate SBC's proposed language in their ICA.

2. Escrow deposits:

Navigator GT&C Issue 10: Which party's language regarding grounds for termination for non-payment should be included in this agreement?

Navigator/SBC MO GT&C 11(b): Should the GT&Cs contain specific guidelines for the method of conducting business transactions pertaining to the rendering of bills, the remittance of payments and disputes arising thereunder? Is it appropriate to require Party's to escrow disputed amounts?

Discussion:

Navigator states that the Final Arbitration Report is inconsistent in that the Arbitrator sided with Navigator on its GT&C Issue 11, finding that CLECs need not escrow disputed amounts while pursuing the dispute resolution process, but agreed with SBC on Navigator's GT&C Issue 10, ruling that SBC could force Navigator to pay disputed amounts into escrow under pain of complete termination of all services. Navigator urges the Commission to resolve this inconsistency by finding that Navigator's proposal for GT&C Issue 10 should be adopted.

Decision:

The Commission agrees that the Final Arbitration Report is inconsistent as alleged by Navigator. However, none of the proposed language is appropriate in view of the Arbitrator's decision that disputed amounts need not be escrowed. SBC's proposed language, adopted by the Arbitrator, states:

14.2.4 if the nonpaying party is required to deposit Disputed Amounts into an interest bearing escrow account, it must provide written evidence that it has established an

⁴⁵ Quate Direct, pp. 10-11.

⁴⁶ LeDoux Rebuttal, p. 4.

interest bearing escrow account that complies with all the terms set forth in Section 9.4 and deposited a sum equal to the Disputed Amounts [other than disputed charges arising from Appendix Reciprocal Compensation] into that account. **Until evidence that the full amount of the Disputed Charges [other than disputed charges arising from Appendix Reciprocal Compensation] has been deposited into an escrow account that complies with Section 9.4 is furnished to the Billing Party, such Unpaid Charges will not be deemed to be “disputed” under Section 10.**

Navigator's proposed language states:

14.2.4 if the nonpaying party is required to deposit Disputed Amounts into an interest bearing escrow account, it must provide written evidence that it has established an interest bearing escrow account that complies with all the terms set forth in Section 9.4 and deposited a sum equal to the Disputed Amounts [other than disputed charges arising from Appendix Reciprocal Compensation] into that account.

The Commission will modify the Final Arbitration Report to reflect that neither party's Section 14.2.4 shall be incorporated into their ICA.

F. Sprint's Comments:

1. Unresolved GT&C Issues Number 4, 5, 7 and 13:

Sprint GT&C Issue 4: Should Sprint be required to have an out of exchange appendix when CLEC is seeking Section 251(a) interconnection with SBC so that CLEC may serve exchanges which are not in SBC's incumbent exchange areas?

Sprint GT&C Issue 5: Should this appendix utilize the term LEC or Telecommunications Carrier?

Sprint GT&C Issue 7: Should the ICA contain a specific definition for Transit Traffic?

Sprint GT&C Issue 13: (a) Should SBC be allowed to require CLEC to use a specific form for submitting billing disputes? (b) Should SBC be obligated to review all CLEC billing disputes if the disputed amount is not placed in escrow?

Discussion:

Sprint states that these disputed issues were properly resolved by the Arbitrator in favor of Sprint. Therefore, Sprint states, the Commission should order that Sprint's position be adopted and that Sprint's proposed language pertaining to these issues be included in the ICA; SBC's proposed language that was disputed by Sprint should be rejected.

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Decision:

Sprint's GT&C Issue 7 was listed and resolved in Sprint's favor in Section 1(C).1 of the Final Arbitrator's Report. Sprint's GT&C Issue 13 was listed and resolved in Sprint's favor in Section I(A).4(e)–Issue 13(a)–and Section I(A).4(d)–Issue 13(b). The parties shall incorporate Sprint's proposed language in their ICA and the Final Arbitrator's Report is modified to the extent that it is inconsistent.

Sprint's GT&C Issues 4 and 5 were omitted from the Final Arbitrator's Report. However, Sprint's ITR Issue 8 is identical to its GT&C Issue 4 and was decided in Sprint's favor at Section XV.1 of the Final Arbitrator's Report. The Report is modified to include Sprint's GT&C Issue 4 at Section XV.1 and the parties are directed to adopt Sprint's language in their ICA.

Sprint did not list its GT&C Issue 5 in its Brief as an issue still requiring a decision by the Arbitrator. This fact explains its absence from the Arbitrator's Report, but does not explain its presence in Sprint's Comments. Having advised the Arbitrator that the point was settled, it is odd that Sprint now requests relief from the Commission.

The disputed language concerns the definition of "routing point." SBC's proposed language states (the contested language appears in bold):

1.1.99 "Routing Point" is a location which a **LEC** has designated on its own network as the homing or routing point for traffic inbound to **Exchange** Service provided by the **LEC** which bears a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access services. The Routing Point need not be the same as the Rating Point, nor must it be located within the Rate Center area, but must be in the same LATA as the NPA-NXX.

Sprint's proposed language states:

1.1.99 "Routing Point" is a location which a **Telecommunications Carrier** has designated on its own network as the homing or routing point for traffic inbound to **Telecommunication** Service provided by the **Telecommunications Carrier** which bears a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access services. The Routing Point need not be the same as the Rating Point, nor must it be located within the Rate Center area, but must be in the same LATA as the NPA-NXX.

SBC stated in its Brief that the Commission should adopt SBC Missouri's proposed language, which utilizes the term "Local Exchange Carrier" ("LEC") as defined in the Act because this term excludes persons who provide services other than telephone exchange or exchange access services, particularly, commercial mobile radio service ("CMRS").⁴⁷ SBC states that Sprint's proposal, to use the term

⁴⁷ McPhee Direct, pp. 27 (footnote 12) and 71-72.

"Telecommunications Carrier," is "an attempt to combine Sprint's non-251 wire-less traffic into this ICA which is improper as this is a Section 251/252 ICA under which UNEs are offered and the provision of such UNEs is limited to LECs, to the exclusion of certain other services, including CMRS providers."⁴⁸

Sprint's position is that the definition of "routing point" should not be not limited to LECs because LERG and industry standards allow for all telecommunications carriers to specify routing points for their numbers.

Having considered the foregoing, the Commission determines that SBC's proposed language should be adopted. In an agreement between two LECs, it is immaterial that other, uninvolved carriers also may have routing points. The Arbitrator's Report is so modified and the parties are directed to incorporate SBC's language in their ICA.

2. Should each party be financially responsible for the facilities on its side of the POI?

Sprint ITR Issue 6: Should each party be financially responsible for the facilities on its side of the POI?

Discussion:

Sprint states that, on pages 9-10 of the Final Arbitrator's Report pertaining to Interconnection, the Arbitrator erroneously suggests the adoption of SBC's proposed language on this issue. Sprint contends that the SBC language logically contradicts the Arbitrator's rulings on other interconnection issues in this arbitration and that the Sprint language should be adopted instead. In addition, Sprint has found additional authority from another jurisdiction supporting its position on this issue.

Sprint states that the Arbitrator's ruling on ITR Issue 6 on cost sharing for the interconnection facilities is not logically consistent with his rulings on other related interconnection issues. The first sentence of the rationale on page 10 of the Arbitrator's Report on Interconnection states that: "Each Party is financially responsible for facilities on its side of the POI." The Arbitrator also ruled on page 6 of the report that a CLEC must establish a POI within SBC's network, and indeed, Sprint agreed with SBC on this issue. If both of these rulings are adopted by the Commission as proposed by the Arbitrator, it seems Sprint would be forced to absorb 100% of the cost of the transport facility that physically joins Sprint's network with SBC's network since this interconnection facility resides on Sprint's side of the POI.

However, the conclusion above is undercut by the second sentence of the Arbitrator's rationale on page 10 of the Arbitrator's Report on Interconnection. There, the Arbitrator states: "A Party that agrees to carry traffic that originated on or transited its network to the terminating carrier's nearest tandem may require the other Party to reciprocate." This sentence clearly indicates that when Sprint carries its originating traffic to SBC's tandem, Sprint may require SBC to "reciprocate" and deliver SBC's originating traffic to Sprint's tandem or switch, resulting in both

⁴⁸ SBC's Brief, pp. 61-62; McPhee Direct, p. 72.

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parties being financially responsible for the transport costs necessary to deliver its originated traffic to the terminating carrier's switch. This shared-cost concept can be implemented in a few ways. Both parties may establish one-way trunks to deliver the traffic onto the terminating party's network or the parties may establish shared, two-way facilities that carry traffic originated by both parties. If shared, two-way facilities are established, Sprint contends that the law, logic and fairness dictate that the cost of this facility must be shared by both parties. It is not acceptable to require Sprint to absorb 100% of the cost of a transport facility that carries both parties' originating traffic. The Commission should reconcile this conflict by adopting the Sprint language proposed for ITR Issue 6 and ruling that the cost of a two-way interconnection facility should be shared.

The FCC rules require each party to assume the costs associated with its originating traffic. Specially, 47 C.F.R. 51.709(b) states "the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of the trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." In addition, 47 C.F.R. 51.703(b) states that "a LEC may not assess charges on any other telecom carrier for telecom traffic that originates on the LEC's network." These two FCC rules make clear that the FCC's intent is not for Sprint to be burdened with 100% of transport costs relating to interconnection facilities used to carry both parties' originating traffic even though that facility is physically located on Sprint's side of the POI.

Sprint states that the Maryland Commission agreed with this Sprint position and decided this issue between AT&T and Verizon.⁴⁹ Specifically, the Maryland Commission stated that:

Each Party is responsible for the cost of delivering its traffic through its network and into the interconnection facility that connects the two networks. The cost of the interconnection facility itself is shared consistent with the rules set for by the FCC in paragraph 1062 of 1996 First Report and Order. In sum, those rules require that the carriers share the cost of the interconnection facility based upon each carrier's percentage of the traffic passing over the facility.⁵⁰

Furthermore, the Maryland Commission states that:

Each carrier is responsible for the cost of transporting its traffic through its network. Both carriers then equitably share the cost of the interconnection facility which connects the two networks, based on each carrier's share of the traffic that passes over the interconnection facility.⁵¹

⁴⁹ See *In the Matter of the Petition of AT&T Communications of Maryland, Inc. Pursuant to 47 U.S.C. 252(b) Concerning Interconnection Rates, Terms and Conditions* (Order No. 79250), Case No. 8882 (Public Serv. Comm. of Maryland, July 7, 2004).

⁵⁰ *Id.*, pp. 9-10.

⁵¹ *Id.*, p. 10.

Finally, Sprint points out that SBC's position in this docket is notably inconsistent with the interconnection arrangements it has with other carriers, including the interconnection arrangement it has with Sprint PCS as well as the arrangement it has with its own affiliate, Cingular. SBC finds the FCC rules applicable in a wireless context and will acknowledge a responsibility to share interconnection facility costs with CMRS carriers, yet SBC claims without basis that those same FCC rules do not apply to interconnection arrangements with CLECs.

Sprint asks that the Commission find that SBC must share the cost of the interconnection facility that physically links the Sprint network with the SBC network and not allow SBC to burden Sprint with 100% of the cost. Sprint's proposed language requires that the cost be shared 50%/50% by both Parties assuming an equal balance of traffic. Sprint would also accept contract language that allows for cost sharing to be based on a proportionate use of the facility — language which is acceptable to SBC when negotiating and interconnecting with CMRS carriers and its own affiliate.

Decision:

The Arbitrator ruled as follows:

Each Party is financially responsible for facilities on its side of the POI. A Party that agrees to carry traffic that originated on or transited its network to the terminating carrier's nearest tandem may require the other Party to reciprocate. Any language pertaining to reciprocal compensation will be addressed in that portion of the agreement.

In its Brief, SBC stated that Section 252(c) and the FCC's implementing rules in the *TRO* and *TRRO* imply that each party should be solely responsible for its facilities on its side of the POI. Moreover, the Commission has previously approved interconnection agreements wherein the two parties have agreed that "CLEC will be responsible for engineering and maintaining its network on its side of the Physical POI. Sprint will be responsible for engineering and maintaining its side of the Physical POI."⁵² No different result should follow here.⁵³

Sprint states in its Brief that the FCC defines § 251 interconnection as "the physical linking of two networks for the mutual exchange of traffic."⁵⁴ The transmission facility that physically links the two networks is the interconnection facility and

⁵² See, Case No. IK-2005-0152, *Order Approving Interconnection Agreement* (between Sprint and Intermedia Communications, Inc.), January 28, 2005 (Interconnection Agreement, Part F, at pp. 40-41); Case No. IK-2005-0151, *Order Approving Interconnection Agreement* (between Sprint and FamilyTel of Missouri, LLC), January 28, 2005 (Interconnection Agreement, Part F, at p. 55).

⁵³ Moreover, Charter's witness stated that "contrary to Mr. Land's testimony, in a fiber meet arrangement, wherever that fiber does meet becomes the POI, and I think it has to be given the responsibilities of each party on their side of the POI." Tr. 685.

⁵⁴ In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325, (August 8, 1996), ¶ 176 (Local Competition Order).

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it is a shared-cost responsibility of the two interconnected networks. The FCC interconnection rules clearly establish that the cost of the transmission facility is a shared-cost responsibility of the two carriers whose networks are being interconnected. First, 47 C.F.R. 51.709(b) states

[T]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of the trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.

Second, 47 C.F.R. 51.703(b) states that "a LEC may not assess charges on any other telecom carrier for telecom traffic that originates on the LEC's network." Together, these rules dictate that both carriers bear a cost responsibility for the interconnection facility because each party is using the interconnection facility to deliver traffic to the other party.

The Commission concurs with the Arbitrator's finding that, in general, each party is solely responsible for the facilities on its side of the POI. Nonetheless, the Commission agrees with Sprint that each party must be financially responsible for its own outgoing traffic. Where the interconnection is via a two-way trunk, the cost of that facility must necessarily be shared. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprint's proposed language.

3. Should non-251(b) or (c) services such as Transit Services be negotiated separately?

Sprint IC Issue 7: Should non 251(b) or (c) services such as Transit Services be negotiated separately?

Discussion and Decision:

Sprint's IC Issue 7 was listed at Section I(C).1 of the Final Arbitrator's Report, but the description of the issue given there was evidently incorrect. Nonetheless, the Arbitrator did determine AT&T Network A-C 11 Issue 4(c), CLEC Coalition IC Issue 1, ITR Issue 4, and NIA Issue 5(a), and MCI RC Issue 18 in that section, all of which are identical to Sprint's IC Issue 7. Sprint is thus correct. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprint's proposed language set out below:

17.2.1 Transit service providers are rightly due compensation for the use of their tandem switching and common transport elements when providing a transit service. This compensation is based on TELRIC pricing and appears in Appendix PRICING.- All Traffic.

4. Future declassifications:

SPRINT UNE3: Should changes in SBC MISSOURI'S unbundling obligation due to lawful action be incorporated into the terms and conditions pursuant to the change in law provisions in the agreements General Terms and Conditions?

Discussion:

Sprint states that there are important technical errors in the Arbitrator's decision matrix regarding UNE Issue 3 that appear to have caused a substantive error as well. The Commission should correct the technical error and adopt all Sprint's proposed language for Issue 3 while rejecting all SBC's proposed language that is disputed by Sprint.

The technical error begins on page 124-6 of the Arbitrator's UNE decision matrix, Attachment III. A. Part 1, where the Arbitrator ruled on proposed contract section 8.4.2. The Sprint language that appears on page 125 next to SBC's section 8.4.3 should actually be added to the end of Sprint's proposed Section 8.4.2 that appears in the Arbitrator's decision matrix and also in the joint DPL filed by the parties. The effect of splitting Sprint's proposed language for section 8.4.2 into two pieces in the Sprint column of the decision matrix is to throw off the alignment of the Sprint proposed language in the remainder of the Arbitrator's decision matrix. For instance, Sprint's proposed section 8.4.3 should be lined up with SBC's proposed section 8.4.3. Sprint's proposed section 8.4.3.1 gets pushed down the matrix and is improperly lined up with SBC's proposed 8.4.4 instead of SBC's proposed 8.4.3.1. Again, this should be remedied by tacking the language on page 125, which begins "If Sprint does not dispute the declassification" to the end of Sprint's section 8.4.2, and then realigning the remaining contract sections.

This misalignment may have inadvertently thrown off the Arbitrator's analysis and created a substantive error as well that the Commission needs to correct. The error creeps in where the Arbitrator rules on section 13.5.2.1 on page 128 of the decision matrix. The Arbitrator states that Sprint's language is not consistent with the Arbitrator's report, but Sprint believes this is inaccurate and likely an inadvertent mistake by the Arbitrator because he was comparing Sprint's proposed language for 8.4.4 to SBC's 13.5.2.1. However, Sprint's terms for section 13.5.2.1 (DS1 Dedicated Transport) are essentially identical to Sprint's terms at 13.5.3.1 (DS3 Dedicated Transport) and 14.11.1 (Dark Fiber Dedicated Transport), which the Arbitrator found entirely consistent with his recommendation. Accordingly, Sprint believes that all of its proposed language is consistent with the law and also the Arbitrator's report and should be adopted by the Commission. The conclusion that Sprint's language should be adopted for 13.5.2.1 is further bolstered by the Arbitrator's ruling for Sprint language on almost every other UNE issue. Sprint urges the Commission to adopt Sprint's proposed language in its entirety for the reasons argued in its brief and supported in its testimony.

Decision:

The Commission concurs with Sprint that the Arbitrator's Report contains technical and substantive errors as Sprint describes. The Report is modified accordingly and the parties are directed to adopt Sprint's language for Section 13.5.2.1.

G. WilTel's Comments:**1. Indemnification and Limitation of Liability:**

WilTel GT&C Issue 12: Is it reasonable for SBC to seek to limit its liability if it violates the law?

Discussion and Decision:

WilTel complains that, although the Arbitrator found for WilTel in his discussion and decision on this issue,⁵⁵ the Detailed Matrix states incorrectly that SBC's language is most consistent with the Report.⁵⁶ SBC's language states that "... each Party's liability ... whether in contract, tort or otherwise, including alleged breaches of this Agreement **and** causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act ... shall not exceed in total the amount" (emphasis added). WilTel's language, on the other hand, states that "... each Party's liability ... whether in contract, tort or otherwise, including alleged breaches of this Agreement, **but excluding** causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act ... shall not exceed in total the amount" (emphasis added). WilTel contends that its language is clearly most consistent with the Report and, therefore, the DLM incorrectly implements the Arbitrator's findings and conclusions in the Report. WilTel requests that the Commission correct the DLM and order that WilTel's proposed language be adopted.

Decision:

The Arbitrator ruled as follows (emphasis added):

[F]irst, that it is improper for this ICA to attempt to limit or alter damages available under a statute. Second, the Arbitrator concludes that it is contrary to public policy to cap liability for intentional, willful or grossly negligent conduct. Third, the Arbitrator concludes that liability and indemnity provisions should be reciprocal and symmetrical.

The Commission agrees with WilTel that its language more closely reflects the Arbitrator's decision. The parties are directed to adopt WilTel's language; to the extent that it is inconsistent, the Arbitrator's Report is modified accordingly.

2. Compliance audits:

WILTEL UNE Issue 18: Which party's auditing language for compliance with the FCC's eligibility is more reasonable and in compliance with FCC rules?

SBC's Statement of the Issue: What guidelines are appropriate for auditing of SBC's eligibility criteria?

⁵⁵ See Report, Section 1(A), at 69.

⁵⁶ Attachment I.A., at 207.

Discussion:

WITel's UNE Issue 18 deals with SBC's auditing rights and obligations pertaining to the eligibility criteria established by the FCC for access to enhanced extended links ("EELs"). WITel complains that the Arbitrator's ruling on the audit issues stated only that "[t]o the extent that these issues relate to SBC Missouri's auditing functions concerning the eligibility criteria, SBC Missouri's proposed language is reasonable."⁵⁷ The Commission's rules require a "reasoned articulation of the basis for the decision on each issue, including how the decision meets the standards set in sections 251 and 252 of the Act."⁵⁸ WITel evidently believes that the Arbitrator's Report does not meet that standard with respect to this issue. Further, WITel complains, many elements of SBC's proposed language are contrary to FCC rules as established in its *TRO*.⁵⁹

The FCC addressed the rights and obligations pertaining to an ILEC's right to audit a CLEC's compliance with the FCC-mandated eligibility criteria set forth in FCC Rule 51.318(b).⁶⁰ Among other things, the FCC mandated that ILECs "should have a limited right" to audit compliance with the service eligibility criteria.⁶¹ The language approved in the Report, however, provides SBC a virtually unlimited right to audit because of SBC's all-encompassing "in addition to any other rights" phrase.⁶² Additionally, SBC's language in Section 2.18.7.4 of the Agreement (see DML Attachment III.B. Part 3, at 80) imposes a 100% compliance standard for the audit which is contrary to the FCC's rules which state clearly that "the concept of materiality governs this type of audit."⁶³ Finally, SBC's language would allow it to seek payment at wholesale rates even during any time period when WITel was in fact in compliance with eligibility criteria, which is clearly contrary to the FCC's Rules and § 251 of the Act requiring SBC to provide access to UNEs at rates that are reasonable and nondiscriminatory.

SBC's proposed audit language goes beyond what is permitted by law in accordance with the FCC's rules and should not have been approved in the Report. WITel's proposed language, on the other hand, is consistent with the FCC's rulings in the *TRO*. WITel requests that the Commission approve its language over SBC's language on this UNE Issue 18.

⁵⁷ Report, Section III, at 39-40.

⁵⁸ Commission Rule 4 CSR 240-36.040(19).

⁵⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17145, ¶ 278 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004) (hereafter referred to as the "*TRO*").

⁶⁰ See *TRO* at ¶¶ 625-629.

⁶¹ *TRO* at ¶ 625.

⁶² See DML Attachment III.B. Part 3, at 79 (Section 2.18.7 of language).

⁶³ *TRO* at ¶ 626, and n. 1905.

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Decision:

In its Brief on this issue, SBC stated that the Commission should adopt its proposed language, related to audits for compliance with the service eligibility criteria, because it: (1) more closely tracks the *TRO* on audits, including the costs thereof; and (2) provides increased certainty on how audits are to be conducted and what is to be done with the results.⁶⁴ The FCC permits annual audits of EELs and high-cap commingled arrangements. The Commission should reject WilTel's proposed language because it improperly limits SBC Missouri's right to be compensated for WilTel's failure to meet the eligibility criteria for the period beginning on the first date of non-compliance of the non-compliant circuit rather than the date that the non-compliant circuit was established. By including this language, SBC Missouri would not be compensated for WilTel's non-compliance in situations where WilTel disconnected service or converted to a wholesale service.

The Commission has reviewed the parties' arguments and cited authorities and concludes that the Arbitrator's decision was correct. The Commission declines to modify the Report on this point.

H. SBC's Comments:**1. Changes in UNE offerings:**

CLEC Coalition GT&C Issue 24: Should SBC MISSOURI be allowed to make changes in its UNE offerings that disrupt provisioning to CLEC without advance notice or written approval of CLEC?

Discussion:

SBC states that the Commission should reverse the Arbitrator's decision with respect to CLEC Coalition GT&C Issue 25 because the parties did not present an issue 25 to the Arbitrator for resolution. As such, SBC asserts, "the decision is arbitrary, capricious, and unlawful in that it is beyond the scope of his authority under the Act and 4 CSR 240 36.040." SBC further contends that, to the extent that the Arbitrator may have meant to refer to CC GT&C 24, the Commission should reverse the Arbitrator's decision as it is "arbitrary and capricious, against the weight of the competent and substantial evidence, and is unlawful for the reasons set forth in Section III [UNEs]."

Decision:

SBC contends that the Arbitrator's decision must be reversed because he referred to a DP by the wrong number. A review of the CLEC Coalition's GT&C DPL reveals what appears to be two issues 24 on successive pages. This is the second of those; perhaps the Arbitrator though the parties had misnumbered the DP. In any event, this scrivener's error does not require reversal or even correction – clearly, SBC is able to identify the DP in question.

⁶⁴ Silver Direct, pp. 87-88.

SBC does not assert any substantive grounds for reversal except a general and unhelpful reference to “the reasons set forth in Section III.” The Commission will not winnow through Section III of SBC’s Comments in an effort to find support for its position. For these reasons, the Commission declines to modify the Arbitrator’s Report.

2. Arbitrator’s Section 15: Provision of Service to End-Users:

Navigator GT&C ISSUE 15: Whether to include language allowing end users to take services from SBC upon end user request?

Discussion:

SBC Missouri states that it seeks clarification with respect to this issue. Specifically, in the Final Arbitrator’s Report, the Arbitrator states that he: “generally agrees with Navigator. Services offered by SBC to ‘win back’ Navigator’s subscribers are subject to retail tariff rates, terms and conditions so far as applicable.”⁶⁵ However, in the Arbitrator’s Detailed Language Decision Matrix, the Arbitrator states that Navigator’s language, which would require SBC Missouri to offer service to winback customers at the rates found in its retail tariff, is “most consistent with Arbitrator’s Report.” Since retail tariffs are not always applicable, Navigator’s proposed language is inconsistent with the Final Arbitrator’s Report. Thus, SBC Missouri seeks a modification, reflected in bold, to Navigator’s proposed language as follows:

CLEC acknowledges that SBC MISSOURI may, upon End User request, provide services directly to such End User similar to those offered to CLEC under this Agreement at the rates found in its retail tariff **to the extent that the service is offered pursuant to a retail tariff.**

Decision:

The Commission agrees with SBC that the Detailed Matrix is inconsistent with the Arbitrator’s decision. The Arbitrator’s Report is modified accordingly and the parties are directed to adopt SBC’s proposed language as set out above.

3. Arbitrator’s Section 23: Accessible Letters:

Navigator GT&C Issue 12: Should the Interconnection Agreement incorporate the nondiscriminatory and commonly used Accessible Letter process as a form of communication between SBC Missouri and Navigator?

⁶⁵ See Arbitrator’s Final Report, Section 1(A), p. 77.

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Discussion:

SBC Missouri states that it seeks clarification with respect to the above-referenced issue. While SBC Missouri agrees that it is simply incorrect that the Accessible Letter process is used to unilaterally change, revise, supersede, amend, modify or otherwise alter the provisions of the ICA, as the Arbitrator acknowledges with respect to Arbitrator's Section 2(b), Accessible Letters are also used to provide notice of tariff changes.⁶⁶ Thus, SBC Missouri contends that Navigator's proposed language should be modified by the language provided in bold:

The parties acknowledge that the Accessible Letter Notification process in no way authorizes SBC Missouri to unilaterally change, revise, supersede, amend, modify or otherwise alter the provisions of this agreement **except provisions regarding services offered via tariff.**

Decision:

At Section I(A).2.(b) of his Report, the Arbitrator held:

The Arbitrator agrees with SBC that any tariff provision or tariff rate incorporated into the ICA should automatically be updated as the referenced tariff is changed. As SBC points out, that is the reason that the ICA references certain tariffs. The Arbitrator further determines that the *quid pro quo* for such automatic incorporation is prior notice to the CLECs via the Accessible Letters process. The Arbitrator agrees with Charter, however, that SBC cannot use tariff modifications to alter the terms of the parties' ICA. The ICA always trumps contrary tariff provisions. Where a CLEC orders under a tariff rather than under the ICA, however, the CLEC is then stuck with the tariff.

Thus, the modification sought here by SBC accords precisely with the Arbitrator's cited ruling and will be granted. The Arbitrator's Report is modified accordingly and the parties are directed to adopt SBC's proposed language as set out above.

4. GT&C Issues that It Appears The Arbitrator Failed to Address:

- (a) What is the proper scope of SBC's obligations under the ICA? Should the ICA refer to "network elements" or "UNEs"?**

CLEC Coalition GT&C Issue 2: (a) [Whereas clause and § 1.1 & 1.2] Should the reference to "network element" be maintained in the ICA, as distinguished from "unbundled network elements"?

⁶⁶ Arbitrator's Final Report, Section 1(a), p. 14.

SBC's Statement of the Issue: Should the Interconnection Agreement obligate SBC to provide UNEs, collocation and resale services outside SBC Missouri's incumbent local exchange area?

Discussion and Decision:

SBC contends that the Arbitrator neglected to determine these DPs. If so, the Arbitrator addressed DPs identical to SBC's above at Section I(A).1.(b) of his Report as well as in Section III thereof. The Arbitrator determined that SBC's obligation to interconnect is not bounded by its ILEC service area, while its obligation to provide access to UNEs is so limited. To the extent that SBC offers services outside of its ILEC service territory, its resale obligations also extend outside of its service territory.

Likewise, the Arbitrator addressed the terminology issue raised by the CLEC Coalition at Section III.A.1.a.i of his Report, although he did not specifically address CLEC Coalition GT&C Issue 2(a) there or elsewhere. The Commission concludes that the Coalition's proposed language best expresses the Arbitrator's decision and the parties are directed to incorporate that language. The Arbitrator's Report is hereby modified accordingly.

(b) Force Majeure language:

Navigator GT&C Issue 13: Should SBC's additional sentence be included in the Force Majeure language in this Agreement?

Discussion and Decision:

Although the parties have generally agreed upon Force Majeure language which should be included in this ICA, the parties were unable to resolve this issue in its entirety and the Arbitrator did not address it. The area of disagreement is whether timely payments of invoiced amounts should be required during a Force Majeure event. In an effort to settle this issue, SBC Missouri proposed the following language, which is also set forth in the SBC Missouri Preliminary Issue Column of the Navigator/SBC Missouri DPL:

Except as otherwise specifically provided in this Agreement, neither Party will be liable for any delay or failure in performance of any part of this Agreement caused by a Force majeure condition, including acts of the United States of America or any state, territory, or political subdivision thereof, acts of God or a public enemy, fires, floods, labor disputes such as strikes and lockouts, freight embargoes, earthquakes, volcanic actions, wars, civil disturbances, cable cuts, or other causes beyond the reasonable control of the Party claiming excusable delay or other failure to perform. Provided, Force Majeure will not include acts of any Governmental Authority relating to environmental, health, or safety conditions at work locations. If any Force Majeure conditions occurs the Party

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whose performance fails or is delayed because of such Force Majeure conditions will give prompt notice to the other Party, whereupon such Party's obligation or performance shall be suspended to the extent that the Party is affected by such Force Majeure Event. The other Party shall likewise be excused from performance of its obligations to the extent such Party's obligations relate to the performance so interfered with. Upon cessation of such Force Majeure condition, the Party whose performance fails or is delayed because of such Force Majeure conditions will give like notice and commence performance hereunder as promptly as reasonable practicable.

The Commission will adopt this language because it strikes a balance between the parties' interests by providing that if one party's performance is excused by a force majeure event, the other party need not perform its contractual obligations with respect to the item that is not provided during the time of the force majeure event.

5. Arbitrator's Section III(4): EELs Eligibility.

**CLEC Coalition UNE Issue 9: How should the parties incorporate the mandatory eligibility criteria applicable to certain combinations of hi-cap loops and transport (EELs)?
(e) Does SBC's example assist the reader in understanding the restrictions on EELs contained in the TRO?**

CLEC Coalition UNE Issue 15: How should EELs be defined in the ICA in light of the TRRO?

Discussion:

SBC states that the Arbitrator's Report does not specifically address the language in Sections 2.20.2.2.6 and 2.20.2.2.7 of the Coalition's proposed language. Nevertheless, the Detailed Language Decision Matrix states that the CLEC Coalition language is consistent with the Arbitrator's Report. SBC Missouri seeks clarification that this is in error and that the Arbitrator's Final Report governs here. SBC Missouri notes that its language was noted as consistent with the Final Report in most sections of this issue and the wording of the Detailed Decision Matrix appears to be in error. This conclusion is further buttressed by page 27 of the Detailed Language Decision Matrix which expressly notes that SBC Missouri's proposed language in 2.20.2.2.7 is consistent with the order. Accordingly, SBC Missouri requests clarification that its proposed language is to be used here.

If it is not intended that SBC Missouri's language be used here, then SBC Missouri requests the Commission to overturn the Arbitrator's decision on the basis that it is unlawful and not supported by substantial and competent evidence. The Coalition's use of "loop" in 2.20.2.2.6, and of "EEL loop" in 2.20.2.2.7 is confusing, not defined, and might be argued to limit the application of the FCC's 51.318(b) criteria applicable to high-capacity EELs and commingled arrangements. The FCC Rule implemented by 2.20.2.2.6 uses the phrase "24 DS1 enhanced extended links or other facilities" (51.318(b)(2)(vi)), but the CC's lan-

guage says "24 DS1 EELs loop or the other facilities". SBC Missouri's proposed language follows the FCC Rule exactly in referencing "24 DS1 EELs or other facilities" and should be adopted. Similarly, in 2.20.2.2.7, the FCC Rule says "Each circuit" (51.318(b)(2)(vii), SBC Missouri's proposed language properly states "Each circuit" but the CC language uses the phrase "Each EEL loop circuit". No explanation is given for the insertion of "loop" other than Coalition's language, but the insertion (i) is contrary to the FCC's Rule 51.318(b) and the TRO; (ii) can only create confusion and, particularly with respect to 2.20.2.2.7, possible erroneous claims that this criteria only applies to EELs when FCC 51.318(b) expressly applies to both high-cap EELs and commingled arrangements; and (iii) is arbitrary and capricious, and not supported by the record. Accordingly, the inclusion of "loop" should be stricken from 2.20.2.2.6 and "EEL loop" stricken from 2.20.2.2.7.

Decision:

The language proposed by the Coalition is as follows (portions objected to by SBC are underlined):

2.20.2.2.6 For each 24 DS1 EELs loop or the other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk for the exchange of local traffic. CLEC is not required to associate the individual EEL collocation termination point with a local interconnection trunk in the same wire center.

2.20.2.2.7 Switching: Each EEL loop circuit to be provided to each customer will be served by switching equipment that is a switch capable of switching local voice traffic.

The language proposed by SBC is as follows (portions objected to by the Coalition are in bold):

2.20.2.2.6 For each 24 DS1 EELs or other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk **that meets the requirements of Section 2.20.4 of this Attachment; and**

2.20.2.2.7 Each circuit to be provided to each **End User** will be served by a switch capable of **providing** local voice traffic.

By way of example only, the application of the foregoing conditions means that a wholesale or retail DS1 or higher service/circuit (whether intrastate or interstate in nature or jurisdiction) comprised, in whole or in part, of a UNE local loop-Unbundled Dedicated Transport(s)-UNE local loop (with or without multiplexing) cannot qualify for at least the reason that the UNE local loop-Unbundled Dedicated Transport combination included within that service/circuit does not terminate to a collocation arrangement. Accordingly, SBC MISSOURI shall not be required to provide, and shall not provide, any UNE combination of a UNE local loop and Un-

bundled Dedicated Transport at DS1 or higher (whether as a UNE combination by themselves, with a network element possessed by CLEC, or pursuant to Commingling, or whether as a new arrangement or from a conversion of an existing service/circuit) that does not terminate to a collocation arrangement that meets the requirements of Section 2.18.3 of this Appendix Lawful UNE. Section 2.18.2 shall apply in any arrangement that includes more than one of the UNEs, facilities, or services set forth in that Section, including, without limitation, to any arrangement where one or more UNEs, facilities, or services not set forth in Section 2.18.2 is also included or otherwise used in that arrangement (whether as part of a UNE combination, Commingled Arrangement, or otherwise), and irrespective of the placement or sequence of them.

The Commission determines that SBC's language is most appropriate, except that the Commission finds the lengthy example at Section 2.20.2.2.7 to be unnecessary. The Report is modified accordingly and the parties are directed to adopt SBC's language as here modified.

6. Arbitrator's Section III(G)(8)(d): Navigator UNE 9:

Navigator UNE Issue 9: Which Party's language accurately describes the party in control of the inside wire on the End User's side of the NID?

Discussion and Decision:

The Commission agrees with SBC that clarification is necessary here. The Final Arbitrator's Report states that "SBC Missouri's language is accepted."⁶⁷ The Detailed Language Decision Matrix, however, indicates that Navigator's language is "most consistent". The Commission modifies the Arbitrator's Report to consistently provide that SBC's language is to be adopted. The parties are directed to comply.

IT IS THEREFORE ORDERED:

1. That the Final Arbitrator's Report, filed in this case on June 21, 2005, is incorporated into this Order by reference.
2. That the parties shall incorporate the Commission's resolution of each open issue as described in this Order into their interconnection agreements and shall file their interconnection agreements no later than 4:00 p.m. on Wednesday, July 13, 2005.
3. That the Staff of the Missouri Public Service Commission shall file a Memorandum and Recommendation advising the Commission that it has reviewed each such proposed interconnection agreement and determined that it complies with this Order and applicable statutes not later than 4:00 p.m. on Monday, July 18, 2005.

⁶⁷ Arbitrator's Final Report, p.69.

4. That this Order shall be effective on July 11, 2005.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

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**An Investigation of the Fiscal and Operational Reliability of
Cass County Telephone Company and New Florence Tele-
phone Company, and and Related Matters of Illegal Activity.***

*Case No. TO-2005-0237
Decided July 15, 2005*

Telecommunications §7. The Commission's Staff, under direction of its Executive Director, enjoys all necessary statutory authority to investigate and review any matter of concern touching upon the safe and responsible operation of a regulated utility. The Commission expects that Staff will promptly investigate any concerns it may have related to Cass County Telephone Company and New Florence Telephone Company.

ORDER DISMISSING CASE

On January 14, 2005, the Commission established this case, during the course of which the Staff of the Commission has been pursuing an investigation of Cass County Telephone Company and New Florence Telephone Company. That investigation led Staff to file a complaint against Cass County Telephone Company on April 8, 2005. Since the investigation in this case has now led to the filing of a complaint, there is no longer a need to keep this investigation case open and the Commission will close it.

The Commission's Staff, under the direction of its Executive Director, enjoys all necessary statutory authority to investigate and review any matter of concern touching upon the safe and responsible operation of a regulated utility. There is no requirement that such investigations be conducted within an active docket. Staff may, from time-to-time, apply to any member of the Commission for such subpoenas as it believes will assist it in any investigation it is conducting. There is no requirement that such subpoenas be issued within an active docket. Whenever such an investigation produces information that would support a complaint, then the Commission's General Counsel may apply to the Commission for authority to file that complaint.

The Commission expects that Staff will promptly investigate any concerns it may have related to Cass County Telephone Company and New Florence Telephone Company. There is no requirement that this investigation be conducted within an active docket. The Commission expects that Staff will seek authority to file any appropriate actions that its findings would support. In the event that Staff's investigation results in a determination that no further action or actions are necessary, the Commission expects Staff to embody those findings in a written report to the Commission.

*See page 237 for another order in this case.

IT IS THEREFORE ORDERED:

1. That this case is closed.
2. That all pending motions are denied.
3. That this order shall become effective on July 15, 2005.

Kevin A. Thompson, Deputy Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant, v. America's Home Brokers, Inc., Respondent.*

*Case No. MC-2005-0028
Decided July 21, 2005*

Manufactured Housing §2. The Director of Manufactured Housing and Modular Units Program of the MPSC filed a complaint against America's Home Brokers, Inc claiming that they did not receive valid waivers of setup responsibilities as part of purchase agreements with customers and they found deficiencies in four homes and failed to correct those. The parties filed an agreement that the Director would dismiss the complaint if 1) America's Home pays a \$1000 penalty and fixes all of the deficiencies noted by a set date. This agreement was approved because both parties agreed to the terms.

ORDER APPROVING STIPULATED AGREEMENT

Background

On July 22, 2004, the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission filed a complaint against America's Home Brokers, Inc. The Director alleged that on several occasions America's Home did not receive a valid waiver of setup responsibilities as part of purchase agreements with customers. Upon inspection, the Director found deficiencies in four homes. Although directed to do so, the company had not corrected the deficiencies at the time the Director filed this complaint.

The Director also noted that America's Home is not registered as a manufactured home dealer. Therefore, red tags prohibiting the sale of the company's inventory were placed on the homes on the company's lot. Upon return visits, the Director noted that many of the homes that were red tagged were missing. The company was instructed to provide proper sales invoices for the missing homes and to attempt to register as a manufactured home dealer. As of the date of the complaint, the company had done neither.

* See page 90 for another order in this case.

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On March 2, 2005, the Commission held an evidentiary hearing in this matter. With regard to all of the violations, America's Home maintained that it is either not responsible, that it has corrected the defect or that there is no code violation. America's Home also informed the Commission that it is no longer in business. As of May of 2004, the company was winding down and the owner had sold the lot.

The Stipulated Agreement

On May 5, 2005, the parties filed an agreement as follows:

- The Director will move to dismiss the complaint if the agreement is approved.
- America's Home will pay a \$1,000 penalty.
- America's Home will correct all deficiencies noted in the complaint by June 19, 2005.
- America's Home will correct by June 19, 2005, deficiencies noted subsequent to the Director filing the complaint.

Discussion

By a pleading filed on June 30, 2005, the Director of the Manufactured Housing and Modular Units Program informed the Commission that America's Home has corrected all deficiencies noted in the Director's complaint.

The Commission has the legal authority to accept a stipulated agreement as offered by the parties as a resolution of issues raised in this case.¹ The Commission notes that every decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.² Consequently, the Commission need not make findings of fact or conclusions of law in this order.

Commission rule 4 CSR 240-2.115 (2)(C) states that if no party objects to the Stipulated Agreement, the Commission may treat the agreement as unanimous. No party has objected to the agreement. The Commission will therefore treat the agreement as unanimous.

The Commission has reviewed the facts of this case and the Stipulated Agreement and finds that the Agreement is reasonable. The Commission will therefore approve the Agreement and direct that the parties to the Agreement comply with its terms.

IT IS THEREFORE ORDERED:

1. That the Stipulated Agreement between the Staff of the Commission and America's Home Brokers is approved.
2. That the parties to the agreement shall comply with its terms.

¹ Section 536.060, RSMo 2000.

² Section 536.090, RSMo 2000.

3. That the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission shall notify the Commission if and when Todd Freund, once owner of America's Home Brokers, Inc., or any entity he controls, is an officer or general partner of, ever applies for registration as a dealer of Manufactured Homes. The Commission shall grant or deny such application.

4. That this order shall become effective on July 31, 2005.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Jones, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of a Proposed Regulatory Plan of Kansas City
Power & Light Company.***

Case No. EO-2005-0329

Decided July 28, 2005

Electric §9. The Commission has the jurisdiction to approve or reject a comprehensive experimental regulatory plan. The Public Service Commission Law is to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. The Commission's approval of an experimental regulatory plan is an embodiment of its jurisdiction, not an abandonment of it.

Electric §20. The Commission found that the experimental regulatory plan provides a framework that should lead to reasonable rates during the expected five-year duration of the construction. The method the signatory parties used to get to those expected reasonable rates is additional amortization. The additional amortization should result in lower capitalized costs during construction, and therefore will result in a lower future rate base upon which customers must pay a return on.

Electric §30. The Commission found that the experimental regulatory plan should include the construction of a coal-fired baseload plant. The plant would be the lowest cost option to adequately and safely serve the projected need for additional baseload capacity. Wind generation alone, energy efficiency alone, or a combination of both, will not meet the customers' needs for additional baseload capacity. Also, integrated gasification combined cycle technology is not advanced enough to allow construction of a baseload plant of the size that needs to be built.

Electric §34. The experimental plan that the Commission approved included investments for accelerated compliance with environmental regulations. The investments are for equipment that is to reduce site emissions of sulfur dioxide, nitrogen oxide, stack particulate matter and mercury. Also, the investments are for a selective catalytic reduction facility and wind generation facilities.

Evidence, Practice & Procedure §8. The Commission treats a non-unanimous stipulation as if the signatories make a joint recommendation. The Commission still must review the competent and substantial evidence to determine how to rule on the issues.

* The Commission, in an order issued on August 23, 2005, denied a motion for rehearing in this case. This case was appealed to Cole County Circuit Court (05ACCC00917). This case was appealed to the Missouri Court of Appeals Western District (WD 66893). See pages 326 and 608 for other orders in this case.

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REGULATORY LAW JUDGE: **Ronald D. Pridgin**

REPORT AND ORDER

Syllabus

The Commission determines that it should approve Kansas City Power & Light Company's Experimental Regulatory Plan, which includes construction of coal-fired generating plant to be known as latan 2.

Procedural History

History Leading Up to this Case

On May 6, 2004, Kansas City Power & Light Company filed its Application to Establish Investigatory Docket and Workshop Process Regarding Kansas City Power & Light Company. The Commission created Case No. EO-2004-0577 to consider that application.

KCPL requested that the Commission issue an order (a) opening an investigatory docket regarding the future supply and pricing of the electric service provided by KCPL; and (b) authorizing the use of the Commission's workshop process to address certain issues related to the future supply and pricing of electricity for KCPL and its customers, and any other issues affecting KCPL that might arise from discussion among the interested parties.

On May 25, 2004, the Commission issued an Order Directing Notice and Setting Intervention Deadline. Several parties, including the Missouri Department of Natural Resources; Aquila, Inc. d/b/a Aquila Networks, Aquila Networks – MPS and Aquila Networks – L&P; The Empire District Electric Company; the City of Kansas City, Missouri; Concerned Citizens of Platte County; Praxair, Inc.; the Missouri Industrial Energy Consumers; and the Missouri Joint Municipal Electric Utility Commission applied to intervene.

On June 3, 2004, the Commission issued an Order Establishing Case which granted KCPL's Application to Establish Investigatory Docket and Workshop Process Regarding Kansas City Power & Light Company, and established an informal, investigatory case designated as Case No. EW-2004-0596. In the June 3 order, the intervenors in Case No. EO-2004-0577 were also made participants in Case No. EW-2004-0596.

In addition to those participants, the Missouri Energy Group; the Sierra Club; Union Electric Company, d/b/a AmerenUE; and Jackson County, Missouri, participated in the workshops conducted in Case No. EW-2004-0596. The Staff of the Missouri Public Service Commission and the Office of the Public Counsel also

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participated throughout the workshop process. On July 1, 2004, the Commission issued its Notice Closing Case in Case No. EO-2004-0577, which formally closed that proceeding.

The Commission held a prehearing conference in Case No. EW-2004-0596 on June 30, 2004. A series of presentations and workshops was held on June 21, June 30, July 21, July 30, August 10-11, August 19, August 24-26, September 7, September 15, September 29, and October 29, 2004. During this period, KCPL conducted numerous informal meetings with a variety of interested groups and individuals to discuss the many issues raised by this proceeding.

The workshop was organized into two teams. Team A reviewed Integrated Resource Planning-related issues, including load forecasting, generation planning, demand side management, environmental issues, and distribution and transmission technologies. A subteam within Team A reviewed affordability, efficiency, and conservation programs. Team B reviewed the financial issues associated with KCPL's various plans, including maintaining KCPL's current investment grade rating on its securities. These Teams were led jointly by KCPL and Staff representatives.

After the workshops in Case No. EW-2004-0596 had concluded, various interested parties, including the Sierra Club and Concerned Citizens of Platte County, held discussions in an effort to resolve the issues presented in the instant case. These discussions included issues related to KCPL's capacity needs for the future, capital investments related to compliance with environmental regulations, infrastructure investments, and customer programs, as well as the likely impact of those investments and programs upon KCPL's future revenue requirements.

On February 18, 2005, the Commission issued its Order Closing Case in Case No. EW-2004-0596. In the Order Closing Case, the Commission stated:

"The Commission agrees that it is time to close this case. It appears that the general discussion has led to the specific give-and-take of settlement-style negotiations. If KCPL develops a regulatory plan (with or without consensus) for which it wants Commission approval, it can request that approval in a new case." (Order Closing Case, pp. 1-2).

History of this Case

On March 28, 2005, KCPL, Staff, Public Counsel, Missouri Department of Natural Resources, Praxair, Missouri Industrial Energy Consumers, Ford Motor Company, Aquila, Empire, and Missouri Joint Municipal Electric Utility Commission (collectively referred to as "Signatory Parties") submitted a Stipulation and Agreement. That agreement included an Experimental Regulatory Plan. The Stipulation is attached to this Order as Attachment No. 1.

Concerned Citizens of Platte County and Sierra Club opposed the agreement. On June 23-24, 27, and July 12, the Commission held an evidentiary hearing. The parties filed proposed Findings of Fact and Conclusions of Law on July 19, and briefs on July 21.

Discussion of Issues Presented

On May 31, 2005, the Staff of the Commission filed a List of Issues. After reviewing the list and the parties' respective position statements, the Commission has determined that the List of Issues contains issues unnecessary and extraneous to this case. As a result, the Commission will not address each and every issue contained in the List of Issues.

The essential substantive issues that the Commission needs to decide are:

1. What action should the Commission take concerning the Experimental Regulatory Plan embodied in the March 28, 2005 Stipulation and Agreement?
2. Should KCPL's Experimental Regulatory Plan include the construction of a coal-fired generation unit at Iatan 2?

The Commission will also address additional legal and procedural issues from the List of Issues in the "Conclusions of Law" Section of this Report and Order. However, in the event that the Commission does not directly address an issue from the List of Issues, it merely indicates that the Commission finds the issue is unnecessary or extraneous.

Because not all parties have signed the Stipulation, and SC/CCPC are opposing certain aspects of the Experimental Regulatory Plan that is embodied in the Stipulation, the Commission will consider this case using the procedures set forth in 4 CSR 2.115(2) relating to Non-unanimous Stipulations and Agreements. That means that the Commission will consider the provisions of the Stipulation filed on March 28, 2005, as if they are joint recommendations of the signatory parties. The Commission will therefore review the competent and substantial evidence to determine how to rule on the issues.

Summary of KCPL's Proposed Experimental Regulatory Plan

The Stipulation, which runs through June 1, 2010, unless otherwise specified in the agreement, contains the key elements of KCPL's proposed Experimental Regulatory Plan and will be briefly summarized below:¹

RESOURCE PLAN

KCPL has committed to investing over \$1.3 billion over the course of the Experimental Regulatory Plan. This investment includes the completion or substantial progress on the following projects:

- 800-900 MW of new coal-fired generation capacity, Iatan 2, to be regulated capacity, excepting the interest that may be owned by a municipality or joint municipal utility commission, located at the Iatan site near Weston, Missouri, of which KCPL will own approximately 500 MWs;
- Environmental investments related to Iatan 1 and LaCygne 1 for accelerated compliance with environmental regulations; the Iatan 1 and LaCygne 1 environmental equipment will provide significant reductions

¹ This summary was taken from the Direct Testimony of Chris B. Giles (Ex. No. 1) and the Commission's review of the provisions of the Stipulation.

in site emissions of sulfur dioxide ("SO₂"), nitrogen oxides, stack particulate matter and mercury, and will position the units to meet compliance requirements set forth in the Clean Air Interstate Rule and the Clean Air Mercury Rule, which were recently promulgated by the U.S. Environmental Protection Agency ("EPA"). With the addition of latan 2 at this site, compliance on latan 1 will ensure that total site emissions after completion of latan 2 will be less than the current site emissions from latan 1 and will help address the environmental concerns of persons living in the area around the latan site;

- Early installation of a selective catalytic reduction ("SCR") facility at LaCygne 1, designed to help maintain attainment of the 8-Hour Ozone standard within the metropolitan Kansas City region. Installation of this SCR before the 2007 ozone season is considered a significant component of the region's proposed ozone mitigation plan by Mid-America Regional Council, regional EPA officials, Kansas Department of Health & Environment and Missouri Department of Natural Resources. With respect to any of the expenditures anticipated for environmental compliance, KCPL will continue to assess the environmental laws to ensure that its expenditures will comply with existing or expected environmental regulations.

- 100 MW of new wind generation facilities to be installed in 2006. KCPL will install an additional 100 MW of new wind generation facilities in 2008 if a detailed evaluation (made with input from Signatory Parties to the Stipulation) supports such an action. KCPL's detailed evaluation will include information obtained from a tall tower wind assessment performed for KCPL at two Missouri sites. The detailed evaluation will use the KCPL tall tower wind assessment information (and other Missouri-specific information, if available) to analyze the cost effectiveness of wind generation in Missouri before installing the second 100 MW of wind generation in any state other than Missouri. The Signatory Parties agree that KCPL will perform an assessment of wind energy resources at Missouri sites determined in concert with Missouri Department of Natural Resources and other interested Signatory Parties. KCPL will obtain access to two (2) Missouri wind assessment locations and will contract to install wind measuring equipment and evaluate data collected at levels between 50 meters up to and including 100 meters above ground level for the ultimate purpose of producing site-specific measurements that can be used to quantify the wind resources in Missouri. The two Missouri tall tower installations will be operating by December 31, 2005. The initial report analyzing the first 12 months of tall tower data will be completed by March 31, 2007. The final report analyzing the first 18 to 21 months of data will be completed by December 31, 2007.

- Implementing a number of customer programs that include demand response, efficiency and affordability programs throughout the period of the Experimental Regulatory Plan. The initially budgeted expenditures for the five (5) year period for Missouri are \$13.8 million for Demand Response Programs, \$2.5 million for Affordability Programs, and \$12.7 million for Efficiency Programs.

- Investing \$42.4 million over the period of the Experimental Regulatory Plan into the transmission and distribution infrastructure to ensure a highly reliable transmission and distribution system.

CUSTOMER SERVICE AND RELIABILITY

KCPL has committed to maintaining good customer service and reliability. KCPL has agreed to provide the Staff and Public Counsel monthly data submitted quarterly (within forty-five (45) days of end of the period) on the following quality of service measures:

Call Center Data

Total Calls Offered to the Call Center

Call Center Staffing including Call Center Management Personnel

Average Speed of Answer

Abandoned Call Rate

Reliability Indicators

Customer Average Interruption Duration Index ("CAIDI")

System Average Interruption Duration Index ("SAIDI")

System Average Interruption Frequency Index ("SAIFI")

Momentary Average Interruption Frequency Index ("MAIFI")

CAIDI, SAIDI, and SAIFI will be reported on both a weather adjusted and unadjusted basis.

RATE MORATORIUM AND FUTURE RATE CASES

The signatories agree that, absent a "significant change" as defined in the Stipulation, they will not seek to change rates through December 31, 2006. KCPL will file rate schedules on February 1, 2006, effective January 1, 2007.

Over the course of the Experimental Regulatory Plan, four rate case filings are contemplated. The first, described as the 2006 Rate Case, and the last, to be filed on October 1, 2009, ("2009 Rate Case") are mandatory. The other two rate cases are optional.²

² The Commission reserves its statutory right under Section 393.150 RSMo to suspend or reject any tariffs KCPL may file during the course of this stipulation, or at any other time.

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The 2006 Rate Case will include prudent expenditures made related to 100 megawatts of wind generation, and those additions to transmission and distribution infrastructure, as set out in the Experimental Regulatory Plan, which are in service prior to the agreed true-up date of the rates approved in the rate case. The 2006 Rate Case will also include an amortization expense of \$17 million on a Missouri jurisdictional basis, but which can be increased or decreased as specified by the Stipulation.

The 2006 Rate Case will also include an amortization related to the Demand Response, Efficiency and Affordability Programs, as set out in the Stipulation. KCPL has agreed that the 2006 Rate Case will also include the filing of a Class Cost of Service Study. No later than February 1, 2006, KCPL will submit to the Signatory Parties a Missouri jurisdictional revenue requirement cost of service study and a Missouri jurisdictional customer class cost of service study covering the twelve months ending December 31, 2005.

If KCPL chooses to file the second rate case, then it will file rate schedules on February 1, 2007, effective January 1, 2008. The 2007 Rate Case will include prudent expenditures for the installation of an SCR facility at LaCygne 1, and the additions to transmission and distribution infrastructure as set out in the Stipulation that are in service prior to the agreed upon true-up date. The 2007 Rate Case will include an amortization expense expected to be \$17 million on a Missouri jurisdictional basis, as may be adjusted upward or downward. The 2007 Rate Case will also include the amortization related to the Demand Response, Efficiency and Affordability Programs, as more fully described in the Stipulation.

If KCPL chooses to file the third rate case, then it will file rate schedules on February 1, 2008, effective January 1, 2009. The 2008 Rate Case will include prudent expenditures for the installation of an SCR facility, a Flue Gas Desulphurization ("FGD") unit and a Baghouse at Iatan 1; 100 MWs of additional wind generation, if warranted; and the additions to transmission and distribution infrastructure as set out in the Stipulation that are in service prior to the agreed upon true-up date. The 2008 Rate Case will include an amortization expense expected to be \$17 million on a Missouri jurisdiction basis, as may be adjusted upward or downward. The 2008 Rate Case will also include the amortization related to the Demand Response, Efficiency and Affordability Programs, as more fully described in the Stipulation.

COST CONTROL SYSTEM

KCPL has agreed to develop and have a cost control system in place that identifies and explains any cost overruns above the definitive estimate during the construction period of the Iatan 2 project, the wind generation projects and the environmental investments.

RIDERS AND SURCHARGES

KCPL has agreed that before June 1, 2015, it will not seek to use any mechanism authorized in SB 179, enacted this year, or other change in state law that would allow riders or surcharges or changes in rates outside of a general rate case based upon a consideration of less than all relevant factors.

INTERIM ENERGY CHARGE

KCPL can propose an Interim Energy Charge ("IEC") in a general rate case filed before June 1, 2015, within the following parameters:

1. The rates and terms for such an IEC shall be established in a rate case along with a determination of the amount of fuel and purchased power costs to be included in the calculation of base rates.
2. The rate or terms for such an IEC shall not be subject to change outside of a general rate case where all relevant factors are considered.
3. The IEC rate "ceiling" may be based on both historical data and forecast data for fuel and purchased power costs, forecasted retail sales, mix of generating units, purchased power, and other factors including plant availability, anticipated outages, both planned and unplanned, and other factors affecting the costs of providing energy to retail customers.
4. The duration of any such IEC shall be established for a specified period of time, not to exceed two years.
5. A refund mechanism shall be established which will allow any over-collections of fuel and purchased power amounts to be returned to ratepayers with interest following a review and true-up of variable fuel and purchased power costs at the conclusion of each IEC. Any uncontested amount of over-collection shall be refunded to ratepayers no later than 60 days following the filing of the IEC true-up recommendation of the Staff.
6. During any IEC period, KCPL shall provide to the Staff, Public Counsel and other interested Signatory Parties monthly reports that include any requested energy and fuel and purchase power cost data.

CURRENT AND ADDITIONAL AMORTIZATIONS

The Signatory Parties agreed that it is desirable to maintain KCPL's debt at an investment grade rating during the period of the construction expenditures contained in the Stipulation. KCPL understands it has the responsibility to act prudently and reasonably in an effort to achieve the goal of maintaining its debt at investment grade levels. KCPL further understands that it is incumbent upon it to act prudently and reasonably so that its investment grade debt rating will not be at risk. The non-KCPL Signatory Parties committed to work with KCPL to ensure that based on prudent and reasonable actions, KCPL has a reasonable opportunity to maintain its bonds at an investment grade rating during the construction period ending June 1, 2010.

As part of this commitment, the non-KCPL Signatory Parties agreed to support the "Additional Amortizations to Maintain Financial Ratios," as defined in the Stipulation and related appendices, in KCPL general rate cases filed prior to June 1, 2010. The "Additional Amortization to Maintain Financial Ratios" will only be an element in any KCPL rate case when the Missouri jurisdictional revenue require-

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ment in that case fails to satisfy the financial ratios shown in Appendix E of the Stipulation through the application of the process illustrated in Appendix F of the Stipulation.

The Signatory Parties agree to support an additional amortization amount added to KCPL's cost of service in a rate case when the projected cash flows resulting from KCPL's Missouri jurisdictional operations, as determined by the Commission, fail to meet or exceed the Missouri jurisdictional portion of the lower end of the top third of the BBB range shown in Appendix E, for the Funds from Operations Interest Coverage ratio and the Funds from Operations as a Percentage of Average Total Debt ratio. The Signatory Parties agree to adopt an amortization level necessary to meet the Missouri jurisdictional portion of these financial ratios under the conditions indicated above.

IMPUTATION OF REVENUES RELATED TO SPECIAL CONTRACTS

KCPL has agreed that for ratemaking determinations, customers using special contracts will be treated as if they were paying the full generally applicable tariff rate for service from KCPL, and other provisions in special contracts will not affect rate base for regulatory purposes.

SO₂ EMISSION ALLOWANCE PROGRAM

The Experimental Regulatory Plan sets out procedures that KCPL will follow to manage its allowance inventory to benefit KCPL and its customers. The plan also has procedures that KCPL will follow to provide the Staff and Public Counsel with information relevant to the Commission's oversight of such activities.

In particular, the proceeds and costs of all transactions identified in the SO₂ Emissions Allowance Management Policy ("SEAMP") will be recorded in Account 254 for ratemaking purposes. The regulatory liability will be amortized over the same time period used to depreciate environmental assets (emission control equipment and other emission control investments).

ALLOWANCE FOR FUNDS USED DURING CONSTRUCTION RATE REDUCTION

KCPL agreed to a 1.25% or 125 basis point reduction in the equity portion of the Allowance For Funds Used During Construction (AFUDC) rate applicable to Iatan 2. KCPL shall use this 125 basis point reduction in the AFUDC rate from the effective date of the Order Approving Stipulation and Agreement in this proceeding, and in all subsequent calculations of AFUDC on Iatan 2 until the in service date of Iatan 2.

However, during the hearing, KCPL agreed to substitute the AFUDC Rate Reduction provision from a similar Kansas Stipulation and Agreement. KCPL agrees to a 2.50% or 250 basis point reduction in the equity portion of the AFUDC rate applicable to Iatan 2 from the effective date of the rates determined in the first rate case (anticipated to be January 1, 2007) and in all subsequent calculation of AFUDC on Iatan 2 until the in-service date of Iatan 2.³

³ On July 26, the Signatory Parties filed a Response to Order Directing Filing. That response memorialized KCPL's agreement to a 250 basis point reduction in the equity portion of AFUDC, and amended Section III.B.1.g. of the Stipulation and Agreement.

OFF-SYSTEM SALES

Under the terms of the Stipulation, KCPL agrees that off-system energy and capacity sales revenues and related costs will continue to be treated “above the line” for ratemaking purposes. KCPL will not propose any adjustment that would remove any portion of its off-system sales from its revenue requirement determination in any rate case. KCPL agrees that it will not argue that these revenues and associated expenses should be excluded from the ratemaking process. During the hearing, KCPL also stipulated that it would agree to this ratemaking treatment for off-system sales as long as the Iatan 2 costs were included in KCPL’s rate base. (Tr. 1037-38).⁴

TRANSMISSION-RELATED REVENUES

KCPL agrees that transmission related revenues and related costs will continue to be treated “above the line” for ratemaking purposes. KCPL specifically agrees not to propose any adjustment that would remove any portion of its transmission related revenues from its revenue requirement determination in any rate case. It further agrees that it will not argue that these revenues and associated expenses should be excluded from the ratemaking process.

PARTNERSHIP ISSUES

According to the Stipulation, KCPL will consider Empire and Aquila preferred potential partners in the Iatan 2 plant with at least a 30% combined share, so long as they can each demonstrate that they have a commercially feasible plan for meeting the necessary financial commitments by the later of August 1, 2005, or such date that KCPL shall issue its request(s) for proposal(s) related to Iatan 2. Such a financing plan must not adversely affect KCPL’s ability to finance its share of the Iatan 2 plant or to complete construction on the timeframe established in the Stipulation.

KCPL will also consider MJMEUC as a preferred potential partner in the Iatan 2 plant with at least 100 MW of the plant’s capacity, so long as it can demonstrate that it has a commercially feasible plan for meeting the necessary financial commitments by the later of August 1, 2005, or such date that KCPL shall issue its request(s) for proposal(s) related to Iatan 2. Such a financing plan must not adversely affect KCPL’s ability to finance its share of the Iatan 2 plant or to complete construction on the timeframe established in the Stipulation.

AGREEMENT CONDITIONED ON APPROVAL BY KANSAS CORPORATION COMMISSION

The Stipulation is conditioned upon the Kansas Corporation Commission’s approval of a Regulatory Plan that is substantially similar to the terms of the Missouri Experimental Regulatory Plan. KCPL will timely file with the Commission the Experimental Regulatory Plan that the KCC approves. Within seven (7) days after KCPL files the KCC approved Experimental Regulatory Plan, the Signatory Parties

⁴ Also in their July 26 Response to Order Directing Filing, the Signatory Parties memorialized KCPL’s agreement that all of its off-system sales would be used to establish Missouri jurisdictional rates as long as the related investments and expenses are considered in determining those rates, and amended Section III.B.1.j. of the Stipulation and Agreement.

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will indicate their disposition respecting the terms of the Experimental Regulatory Plan. KCPL agrees that it will offer to the Signatory Parties and accept comparable terms to those terms that the KCC approves.

RELIANCE ON INFORMATION PROVIDED BY KCPL

The Stipulation, at Section III.B.10.c, page 53, addresses the effect of the Commission finding that (1) KCPL failed to provide the Signatory Parties with material and relevant information in its possession, or which should have been available to KCPL through reasonable investigation, or (2) KCPL misrepresented facts relevant to the Stipulation.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission has considered the parties' positions and arguments. Failure to specifically address a piece of evidence, position, or argument does not mean that the Commission failed to consider it, but instead means that the omitted material was not dispositive of this decision.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises."⁵ Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.⁶ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.⁷ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁸

⁵ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

⁶ *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

⁷ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

⁸ *Id.* (quoting 2 Am.Jur.2d Administrative Law § 455, at 268).

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”⁹ Findings of fact are also inadequate that “provide no insight into how controlling issues were resolved” or that are “completely conclusory.”¹⁰ With these points in mind, the Commission renders the following Findings of Fact.

The Proposed Regulatory Plan is in the public interest

Based upon the competent and substantial evidence on the whole record, the Commission finds that the Experimental Regulatory Plan embodied in the Stipulation is in the public interest. The Commission also finds that KCPL's Experimental Regulatory Plan should include the construction of a coal-fired baseload plant at Iatan 2.

The Commission agrees with Public Counsel witness Trippensee that the Stipulation strikes a reasonable and appropriate balance between the interests of customers and shareholders (Ex. 39, p. 24). Staff witness Wood confirmed Mr. Trippensee's analysis. Testifying about Iatan 2, Mr. Wood testified: “I believe it's needed and it is the most appropriate resource addition given all the information available today to serve the growing load and provide for the lowest possible rates to customers.” (Tr. 609). Staff witness Schallenberg was the primary facilitator for the negotiations of the Stipulation, and testified that he was involved in development of all of the provisions of the Stipulation. (Tr. 805). He testified that the Stipulation is in the public interest, and he recommended that the Commission approve its provisions. (Tr. 806, 816).

Based upon the testimony of KCPL witness John Grimwade (Ex. 37, p. 7), and Staff witnesses Mantle (Tr. 856), Wood (Tr. 602-04), Warren (Tr. 874, 916) and Elliott (Tr. 920, 923, 940-41, 961), the Commission finds and concludes that there is a reasonably projected need for additional baseload capacity in the year 2010. Mr. Grimwade's testimony demonstrated that with no changes to existing generation and no additional demand side management, based on a 12% capacity margin and a projected peak load of 3,959 MW, KCPL will have a capacity shortfall of 431 MW in 2010. (Ex. No. 37, p. 7). His analysis demonstrates that under base case assumptions that the Commission finds to be reasonable, the addition of a 500 MW share of a pulverized coal-fired generating unit resulted in the lowest Present Value of Revenue Requirements, and that the optimal timing of this addition would be during the 2010 to 2012 time frame. (Ex. No. 37, pp. 8-10).

Without repeating evidence summarized above, the Commission finds that Staff supported KCPL's position (as did all other Signatory Parties) that there is a need for coal-fired capacity on the KCPL system. Mr. Wood testified that KCPL's 500 MW share of Iatan 2 is appropriate to meet this need for its baseload generation

⁹ *St. ex rel. Int'l. Telecharge, Inc. v. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

¹⁰ *St. ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

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(Tr. 600), particularly given the increase in the price of natural gas and the need for low-cost coal generation (Tr. 602-03). Based upon the Staff's review of KCPL's needs, additional baseload as proposed in the Stipulation is warranted. (Tr. 604).

Mr. Wood also explained the inaccuracies in the analysis provided at the Kansas City local public hearing by Witness Byron Combs. (Tr. 593). Mr. Combs claimed that KCPL does not need to build Iatan 2 for baseload, but instead that KCPL wants to build it to make off-system sales. (Kansas City Public Hearing Exhibit No. 3). As correctly analyzed, the U.S. Energy Information Administration and FERC data supported Mr. Wood's conclusion that during the times Mr. Combs analyzed, KCPL was a net purchaser of power at times. Mr. Wood further concluded: "In looking at their current position, growth rates and where they are anticipated to be in the time frame this unit (Iatan 2) could be built, a unit of this size appears to be appropriate. In fact between now and when that unit would come on, there will likely be some short-term provisions that need to be made in order to have the capacity to serve the obligations required by SPP in that time frame." (Tr. 600). Further, Mr. Wood testified that "(i)n the end, those revenues brought in through (the) off-system sales provide for an offset in operating expenses and can end up resulting in lower rates to customers." (Tr. 600).

Mr. Wood's testimony was consistent with Mr. Grimwade's testimony. Mr. Grimwade summarized KCPL's position in Exhibit No. 43, excerpts from a strategic planning forecast of both peak demand and energy.¹¹ This exhibit shows that for the next five years KCPL expects 2.4% peak load growth, with an overall growth rate from 2004 to 2014 of 1.9%. (Tr. 638-39). KCPL also assessed the energy needs of its customers for 2004-2014, and concluded that its customers' overall energy demand would grow at an annual rate of 2.1%. (Tr. 639-40). Mr. Grimwade stated that this analysis was based upon a 25-year history of company experience, and was weather normalized. *Id.*

Wind generation and energy efficiency are an important part of a comprehensive and balanced resource plan. But the Commission finds and concludes that wind generation alone, energy efficiency alone, or a combination of both, cannot meet KCPL's customers' needs for additional baseload capacity during the term of the Experimental Regulatory Plan.

Sierra Club's witness Troy Helming advocated wind. Yet during the hearing, he admitted that KCPL should not build the 1600 megawatt wind farm that he once believed it should build. (Ex. 6, Tr. 255-56). Mr. Helming stated that wind is intermittent and that as a generation source, wind has its own set of interconnection, transmission overload and aesthetics issues. (Tr. 257-62). What is more, Sierra Club's other witness, Ned Ford, does not approve of wind as a peaking source, much less a baseload source. (Tr. 400-402). The Commission finds and concludes that Concerned Citizens of Platte County's and Sierra's Club's evidence concerning wind generation is contradictory and unconvincing.

¹¹ Exhibit No. 43 is comprised of two pages. The first page of Exhibit No. 43 and page 15 of exhibit No. 50 are identical except for the page numbers. The second page of Exhibit No. 43 and page 16 of Exhibit No. 50 are identical except for the page numbers.

Concerning energy efficiency, Staff witness Mantle, who was Staff's facilitator for demand management in KCPL's workshop process, testified that, in her opinion, demand response and energy efficiency programs could not reduce the load growth to the point that latan 2 would not be needed in 2010. (Tr. 850, 856). Sierra Club witness Ford testified that KCPL could avoid building latan 2 simply by implementing energy efficiency programs. (Tr. 326-28). But Mr. Ford concluded as much without attending the KCPL workshops (Tr. 408), without looking at KCPL's confidential information regarding load forecasting and integrated resource plans (Tr. 411), without talking to KCPL personnel (Tr. 416), or without discussing with the signatory parties the reasons that they entered into the Stipulation and Agreement. (Tr. 411). Thus the Commission finds that Mr. Ford's testimony is less credible than Ms. Mantle's.

While Concerned Citizens of Platte County and Sierra Club argued that KCPL should pursue IGCC (integrated gasification combined cycle) technology, the Commission finds and concludes that the competent and substantial evidence respecting IGCC technology does not support a large-scale project comparable to latan 2. Sierra Club's witness Ford agreed with KCPL's view that IGCC plants "are new and unproven." (Tr. 328). He did not propose that KCPL construct such a plant. (Tr. 328, 383). Sierra Club's witness Helming testified that he was not familiar with the technology that KCPL proposed to use at latan 2 and could not express any opinion on the technology that should be employed there. "I'm a wind guy, not a thermal plant guy." (Tr. 263). He noted that the largest IGCC plant in operation today was the 250 MW plant operated by Tampa Electric. (Tr. 277).

Mr. Hale from MDNR testified that IGCC units are only being proposed in the neighborhood of 300 MWs, are "considerably more expensive at this time to build," and have reliability and availability issues that prevent them from serving as baseload units. (Tr. 709). KCPL Exhibit No. 41 summarizes the state of IGCC technology and concludes that when IGCC emissions are compared with those of a super-critical pulverized coal plant, such as planned for latan 2, the results are comparable. See Ex. No. 41 at B7. Considering the significant cost and reliability risks associated with developing IGCC technology on a large scale basis, the Commission finds and concludes that the use of the super-critical pulverized coal technology at latan 2 is the appropriate choice at this time.

As Mr. Grimwade noted, IGCC, while promising for future development, has not progressed to the point it would be a viable option for consideration for addressing near term baseload requirements. (Ex. No. 37, p. 14). The Commission therefore finds Mr. Helming's recommendation that KCPL should build between 1200 MW to 1600 MWs of IGCC units is not reasonable or persuasive.

As Mr. Grimwade's testimony pointed out, the addition of a coal-fired plant was particularly favorable for the KCPL system, assuming high gas price assumptions (Ex. 37, p.9). With the recent dramatic rise in natural gas prices, the Commission finds and concludes that heavy reliance on additional natural gas-fired combustion turbines or natural gas combined cycle units would not appear to be an optimal strategy at this time.

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The Proposed Regulatory Plan should result in lower rates

The Commission finds that the proposed Experimental Regulatory Plan provides a framework that should lead to reasonable rates during the expected 5-year duration of the construction period for the projects included in the Experimental Regulatory Plan. The Commission also agrees with Mr. Schallenberg and Mr. Trippensee that the Stipulation contains provisions that facilitate lower rates for customers in the future that would not exist absent this Stipulation (Ex. 39, pp. 5-8; Tr. 811-812).

The method the signatory parties used to get those lower future rates is additional amortization. KCPL witness Giles testified that the amortization will result in an offset to rate base, which will result in lower rates. (Ex. 1, p. 17). Public Counsel witness Trippensee explained how an increase in amortization expense, rather than an increase in earnings, would result in lower rates:

The reason for the higher rates would be the income taxes associated with receiving a dollar of earnings. Simply put, utilities pay

income taxes only on their earnings. Therefore, to receive a \$1.00 of earnings, a utility must receive approximately \$1.62 of revenue from the customer. The amortization procedure included in this Agreement anticipates that amortization expense (the accelerated recovery of past capital investments of the company) will be offset in the income tax calculation by the depreciation expense associated with the new investment. This will reduce or eliminate the 62 cents that must be recovered from the customer to provide a \$1.00 of cash flow to the Company during the construction phase. (Ex. 39, p.11)

Specifically, the Commission finds and concludes that this Stipulation provides for lower capitalized facilities costs during the period of construction, and therefore will result in a lower future rate base upon which customers must pay a return of and on. In particular, the Commission finds that the use of additional amortizations as proposed by the Signatory Parties to maintain the investment grade ratings of KCPL during the term of the Experimental Regulatory Plan is in the public interest, and will result in lower rates to consumers over the long term. In addition, KCPL's agreement to reduce its AFUDC rate on Iatan 2 by 250 basis points will reduce the overall cost of construction of Iatan 2, and will therefore promote the public interest.

The Commission finds that the treatment of off-system sales is an important part of its conclusion that the Proposed Regulatory Plan is in the public interest. The signatory parties' recommendation states as follows:

"KCPL agrees that off-system energy and capacity sales revenues and related costs will continue to be treated above the line for ratemaking purposes. KCPL specifically agrees not to propose any adjustment that would remove any portion of its off-system sales from its revenue requirement in any rate case, and KCPL agrees that it will not argue that these

revenues and associated expenses should be excluded from the ratemaking process. KCPL agrees that all of its off-system energy and capacity sales revenue will continue to be used to establish Missouri jurisdictional rates as long as the related investments and expenses are considered in the determination of Missouri jurisdictional rates.” (Signatory Parties’ Response to Order Directing Filing, July 25, 2005) (amending Section III.B.1.j. of the Stipulation and Agreement)

Based upon the testimony of KCPL witnesses Giles and Cline, the Commission finds and concludes that the Stipulation should also positively affect KCPL’s credit ratings (Ex. 1, pp. 16-18; Ex. 36, pp. 2-5). Thus, KCPL should have lower debt costs that it will pass on to consumers in the form of lower future rates. The Commission also concludes, based upon the testimony of KCPL witnesses Giles and Cline, Public Counsel witness Trippensee, and Staff witness Schallenberg, that it is reasonable and appropriate to adopt regulatory policies, including the use of the additional amortization provision contained in the Stipulation, that are designed to give KCPL the opportunity to maintain its investment grade ratings during the term of the Experimental Regulatory Plan, based on the conditions set out in the Experimental Regulatory Plan regarding KCPL’s necessary conduct.

Other Findings of Fact

Based upon the competent and substantial evidence in the whole record, the Commission finds and concludes that KCPL’s Experimental Regulatory Plan should include the construction of Iatan 2, as proposed by the Stipulation. The Commission further finds and concludes that competent and substantial evidence supports the Signatory Parties’ position that “under the unique circumstances respecting KCPL, the capital investment package described in Section III.B.4 and the customer programs described in Section III.B.5 constitute major elements of a reasonable and adequate resource plan at the time the Signatory Parties entered into this Agreement.” (Stipulation, pp. 6-7).

The Commission further finds and concludes that the competent and substantial evidence in the whole record supports the approval of the additional provisions of the Stipulation, including the following specific approvals: (1) KCPL is authorized to manage its SO₂ emission allowance inventory, including the sales of such allowances, as detailed in Section III.B.1.d (Stipulation, pp. 8-10); (2) KCPL is authorized to establish a regulatory asset or liability on KCPL’s books related to FAS 87 pension expense, as detailed in Section III.B.1.e (Stipulation, pp. 10-15); (3) KCPL is authorized to reduce its AFUDC rate in the equity portion of the AFUDC rate by 250 basis points applicable to Iatan 2, as detailed in Section III.B.1.g and modified by agreement of the Signatory Parties; (4) KCPL is authorized to record additional amortization expense in the amount of \$10.3 million on an annual Missouri jurisdictional basis beginning with the effective date of the Stipulation until the effective date of the tariffs resulting from Rate Filing #1, as detailed in Section III.B.3.a of the Stipulation (Stipulation, p. 18); (5) KCPL is authorized to begin recording depreciation expense for the Wolf Creek Nuclear Generating Station based upon a 60-year life span, and KCPL is authorized to use depreciation rates

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for the various nuclear plant accounts, as detailed in Section III.B.1.n (Stipulation, p. 24); (6) KCPL is authorized to depreciate wind assets over a 20-year life and use depreciation rates for wind assets, as detailed in Section III.B.3.k (Stipulation, p. 23); and (7) KCPL is authorized to accumulate the Demand Response, Efficiency and Affordability Program costs in regulatory asset accounts as the costs are incurred, and amortize those costs as detailed in Section III.B.5 (Stipulation, pp. 46-49).

CONCLUSIONS OF LAW

1. Based upon the competent and substantial evidence in the whole record, the Commission finds and concludes that the Proposed Regulatory Plan promotes safe and adequate service since it establishes a framework for substantial investments into the infrastructure necessary for KCPL to provide safe and adequate service in the future.

2. The Commission finds and concludes that the Experimental Regulatory Plan does not make or grant any undue or unreasonable preference, advantage, prejudice or disadvantage in KCPL's provision of service now, or in the future, because the Commission is not engaging in any setting of rates now, and in the future, the Commission will be called upon to establish just, reasonable, and non-discriminatory rates only within the context of ratemaking proceedings.

3. The Commission finds and concludes that the Proposed Regulatory Plan is in the public interest and is firmly supported by the competent and substantial evidence on the whole record, and that the Stipulation embodied in that Proposed Regulatory Plan is lawful in that it promotes "safe and adequate" service and facilities, in a "just and reasonable" manner. See Section 393.130.1. Such a determination meets the requirements of law that call for Commission decisions to be lawful, to be supported by competent and substantial evidence upon the whole record, and not be arbitrary, capricious or unreasonable. See Section 386.510 ("lawful" and "reasonable" requirements). Given the wide latitude that the Commission possesses in authorizing experimental regulatory plans, the Commission finds and concludes that the approval of the Stipulation does not constitute an abuse of discretion.

4. The Commission finds and concludes that the Signatory Parties have properly invoked the jurisdiction of the Commission. KCPL's request, joined by the Signatory Parties, that the Commission approve the Stipulation has properly invoked the basic jurisdiction of the Commission. Under Section 386.250(1), the Commission's authority extends to the manufacture, sale or distribution of electricity, and to "corporations owning, leasing, operating or controlling the same." Section 386.250(7) provides for the broad exercise of this jurisdiction "to such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly." See Section 386.040. The provisions of the Public Service Commission Law "shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." Section 386.610.

The Experimental Regulatory Plan addresses a multitude of resource adequacy issues. Given KCPL's obligation to "furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects

just and reasonable" under Section 393.130.1, KCPL and the other signatory parties have invoked the Commission's jurisdiction plainly.

The Commission's exercise of jurisdiction is also consistent with its general powers under Section 393.140. Section 393.140(3) gives the Commission authority to investigate "on its own motion" "plants and methods employed in manufacturing, delivering and supplying electricity." Furthermore, Section 393.140(5) gives the Commission the ability to "prescribe the safe, efficient and adequate property, equipment and appliances thereof." Because the Commission has the power on its own motion to engage in such regulatory oversight, it follows that Commissioners may examine a Stipulation dealing with all these issues and approve it in a formal proceeding initiated by the filing of the Stipulation.

Furthermore, the authority of this Commission to approve an experimental rate plan is well within its powers.¹² Indeed, the Court of Appeals has characterized the Union Electric experimental alternative regulation plan "not as an abdication of the Commission's responsibility to regulate, but as embodiment of it. It was an attempt to streamline the rate monitoring process and provided a means to resolve issues in lieu of the formal complaint process."¹³ Like the experimental plans approved by the Commission for Union Electric in 1995 and 1997, this Stipulation contemplates "extensive and continuous monitoring and embrace[s] the recognition that not all items [can] be anticipated and addressed"¹⁴ Other jurisdictional and ratemaking principles remain completely intact in this Stipulation.

Commission Rule 4 CSR 240-2.115 allows parties to file a stipulation and agreement to resolve a contested case. Nothing in statutes, case law or Commission rule prohibits parties from submitting a stipulation arising from other proceedings. To conclude that a pre-existing contested case is a prerequisite to a resolution of serious and well-known issues would be contrary to the regulation's purpose itself of promoting settlements,¹⁵ as well as contrary to Missouri law which permits settlements in other contexts shortly after the filing of an action.¹⁶ Numerous proceedings before the Commission have been initiated by the filing of a stipulation and agreement, or other motion to open an investigatory docket rather than a formal Application.¹⁷

¹² See *Union Electric Co. v. PSC*, 136 S.W.3d 146, 149, 152 (Mo. App. W.D. 2004).

¹³ *Id.* at 152.

¹⁴ *Id.* See also *State ex rel. Laclede Gas Co. v. PSC*, 535 S.W.2d at 567, n.1 (noting the Missouri Supreme Court "has long held" that the Commission has the power to grant interim test or experimental rates "as a matter of necessary implication from practical necessity").

¹⁵ Section 536.060, RSMo.

¹⁶ See Section 416.061.4 (consent judgments or decrees brought by Attorney General).

¹⁷ See e.g., *In re Stipulation and Agreement Reducing the Annual Missouri Retail Electric Revenues of Kansas City Power & Light Company*, Order Denying Intervention And Approving Stipulation And Agreement, Case No. ER-99-313, 8 Mo.P.S.C.3d 113 (1999); *In re Customer Class Cost of Service and Comprehensive Rate Design Investigation of Kansas City Power & Light Company*, Order Approving Stipulation and Agreement, Case No. EO-94-199, 5 Mo.P.S.C.3d 76 (1996); *In re Commission Inquiry Into Retail Electric Competition*, Order Establishing Task Force, Case No. EW-97-245, 6 Mo.P.S.C.3d 302 (1997).

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The Commission has the power to waive any of its rules of practice and procedure for good cause under 4 CSR 240-2.015. The parties' unprecedented efforts to timely address the multitude of complex issues respecting KCPL's resource needs in Case No. EW-2004-0596, and the agreement upon the comprehensive framework embodied in the Stipulation, are good cause. To the extent that the Commission's rules require formal application, the Commission waives those rules.

5. The Stipulation Creates Obligations for the Signatories, not the Commission. The Stipulation is a contract among the Signatory Parties, who will be obligated to carry out its terms if approved by the Commission.¹⁸ However, the Commission's approval will not make it a party to the contract.¹⁹ The Stipulation expressly provides that it "does not constitute a contract with the Commission," whose regulatory powers remain fully intact.²⁰ It is, therefore, consistent with Missouri law.²¹

Approval of the Stipulation, however, does include Commission approval of the following items: (1) KCPL is authorized to manage its SO₂ emission allowance inventory, including the sales of such allowances, as detailed in Section III.B.1.d (Stipulation, pp. 8-10); (2) KCPL is authorized to establish a regulatory asset or liability on its books related to FAS 87 pension expense, as detailed in Section III.B.1.e (Stipulation, pp. 10-15); (3) KCPL is authorized to reduce its AFUDC rate in the equity portion of the AFUDC rate by 250 basis points applicable to latan 2, as detailed in Section III.B.1.g and modified by agreement of the Signatory Parties; (4) KCPL is authorized to record additional amortization expense in the amount of \$10.3 million on an annual Missouri jurisdictional basis beginning with the effective date of the Agreement until the effective date of the tariffs resulting from Rate Filing #1, as detailed in Section III.B.3.a of the Stipulation (Stipulation, p. 18); (5) KCPL is authorized to begin recording depreciation expense for the Wolf Creek Nuclear Generating Station based upon a 60-year life span, and KCPL is authorized to use depreciation rates for the various nuclear plant accounts, as detailed in Section III.B.1.n (Stipulation, p. 24); (6) KCPL is authorized to depreciate wind assets over a 20 year life and use depreciation rates for wind assets, as detailed in Section III.B.3.k (Stipulation, p. 23); and (7) KCPL is authorized to accumulate the Demand Response, Efficiency and Affordability Program costs in regulatory asset accounts as the costs are incurred, and amortize those costs as detailed in Section III.B.5 (Stipulation, pp. 46-49).

6. The Commission finds and concludes that the Experimental Regulatory Plan does not violate the "fully operational and used for service" standard of Section 393.135 with regard to any of the infrastructure contemplated in the Experimental Regulatory Plan. A strict set of In-Service Criteria is contained in Appendix H to the

¹⁸ See Stipulation, Section III.B.10.f at 53.

¹⁹ *Id.*, Section III.B.10.g at 53-54.

²⁰ *Id.*

²¹ See *State ex rel. Chicago, Rock Island & Pacific R.R. v. PSC*, 312 S.W.2d 791, 796 (Mo. 1958); *Union Elec. Co. v. PSC*, 136 S.W.2d 146, 152 (Mo. App. W.D. 2004).

Stipulation, which applies to all of KCPL's units. KCPL, Staff and Public Counsel have further agreed to develop in-service criteria for emissions equipment to be constructed on KCPL's coal units.²² The provisions relating to current and additional amortizations are based on KCPL's current operations, not future projected events.²³ Such amortizations will be managed to maintain KCPL's financial integrity, in a manner similar to tax normalization and accelerated depreciation that the courts have been found to be proper ratemaking tools.²⁴ When the amortizations are considered in future rate cases, any party may request that an amortization be directed toward specific plant accounts or that changes be made in depreciation rates based upon future depreciation studies.²⁵

The Commission approved a similar \$3.5 million amortization in *In re Customer Class Cost of Service and Comprehensive Rate Design Investigation of Kansas City Power & Light Company*, Order Approving Stipulation and Agreement, Case No. EO-94-199, 5 Mo.P.S.C.3d 76 (1996), and subsequently extended in *In re Stipulation and Agreement Reducing the Annual Missouri Retail Electric Revenues of Kansas City Power & Light Company*, Order Denying Intervention And Approving Stipulation And Agreement, Case No. ER-99-313, 8 Mo.P.S.C.3d 113 (1999). The Commission finds and concludes that continued use of such amortizations, as discussed in the Stipulation, is reasonable, lawful, and otherwise in the public interest.

7. The Commission finds and concludes that the Stipulation contains nothing which commits the Commission, a non-signatory party or even a Signatory Party to a preapproval of rates. Indeed, the Signatory Parties retain the right to monitor the prudence of KCPL's actions in carrying out the investments called for by the Experimental Regulatory Plan, and to challenge any conduct they believe is imprudent.

The Signatory Parties agree that the elements of the Stipulation that call for a coal-fired plant, wind generation, new environmental controls, and the Demand Response, Efficiency and Affordability programs are "a reasonable and adequate resource plan."²⁶ However, the manner in which KCPL implements each of these investments is subject to scrutiny during the construction process by Staff, Public Counsel and others.²⁷ The Stipulation does not limit any Signatory Party's ability to challenge KCPL when it proposes to recover its costs in future rate cases.²⁸ However, the Signatory Parties have agreed not to argue that the proposed investments were not necessary or timely, or that alternative technologies or fuels

²² See Stipulation, Section III.B.1.i at 23.

²³ *Id.*, Section III.B.1.i at 19-21.

²⁴ *State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC*, 606 S.W.2d 222, 224-26 (Mo. App. W.D. 1980)(approving Commission's use of the normalization of taxes which provided utility with substantial tax benefits of accelerated depreciation).

²⁵ See Stipulation, Section III.B.3.a(iv) at 32.

²⁶ See Stipulation, Section III.B.1.a at 6-7.

²⁷ *Id.*, Section III.B.1.o at 24-25; III.B.4-.5 at 44-49.

²⁸ *Id.*, Section III.B.3.a(iii) at 31.

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should have been used, so long as KCPL implements the Resource Plan and the continuous monitoring of the Resource Plan in accordance with the Stipulation's provisions.²⁹ The Commission's approval of these elements of the Experimental Regulatory Plan would be consistent with its finding in *In re Missouri-American Water Co.*³⁰

8. The Commission finds and concludes that the approval of the Stipulation will not inject it into managing KCPL. The standard frequently cited in Missouri case law is that the Commission has no authority to take over the general management of any utility or to dictate the manner in which the company shall conduct its business.³¹ The Stipulation, in contrast, calls for the Commission to approve an Experimental Regulatory Plan. By approving the Stipulation, the Commission is permitting KCPL's management to carry out its resource and financial plans, and to use its best judgment in implementing them within the bounds of reasonable and lawful oversight.

As such, it is similar to the Commission's action in finding that a water utility's plan to build a new treatment plant was "a reasonable alternative" when it granted that utility a certificate of convenience and necessity for that purpose, and when it approved the utility's financial plan to support that construction as "reasonable and not detrimental to the public interest."³²

9. The Commission finds and concludes that KCPL has not violated Commission Rule 4 CSR 240-22.050(2)(C).

In their Prehearing Brief, SC/CCPC made the following allegation:

KCPL violated 4 CSR 240-22.050(2)(C) by failing to look at the amount of capacity avoidance needed to defer latan 2 for a whole year as an alternative for a whole year. Had KCPL conducted the requisite look, it would have seen that the construction of latan 2 could be avoided. (SC/CCPC Prehearing Brief, p. 3)

²⁹ *Id.*

³⁰ Case No. WA-97-46 (Mo. P.S.C. 1997) ("[T]he Commission will make no finding regarding the prudence of the actual costs incurred and the management of construction of the proposed project. However, based on the extensive evidence presented, the Commission finds that the proposed project, consisting of the facilities for a new groundwater source of supply and treatment at a remote site, is a reasonable alternative." (slip opinion, pp. 10-11; see also *In re Missouri-American Water Co.*, Case No. WR-2000-281, 9 Mo.P.S.C.3d 254, 280 (Mo. P.S.C. 2000)).

³¹ See *State ex rel. Laclede Gas Co. v. PSC*, 600 S.W.2d 222, 228 (Mo. 1980); *State ex rel. PSC v. Bonacker*, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995).

³² *In re Missouri-American Water Co.*, Case No. WA-97-46 (Mo. P.S.C. 1997) (slip op. at 10-11) ("The Commission will approve the financial transaction and form of the lease agreement but defer to a future rate proceeding any finding regarding the prudence of the transaction, its costs and the specific contents of the lease agreement."). Accord, *Union Elec. Co. v. PSC*, 136 S.W.3d 146, 149-52 (Mo. App. W.D. 2004) (Commission approval of experimental regulatory plan).

After having reviewed the legal arguments on this issue, the Commission concludes that this allegation is in error.³³ SC/CCPC has failed to fully understand the purpose and application of 4 CSR 240-22.050(2). According to Public Counsel witness Ryan Kind, the purpose of this regulation pertains to the calculation of the public utility's "avoided cost," and not an affirmative requirement to propose a plan to defer the construction of Iatan 2 by one year, as contended by SC/CCPC. (Tr. 797).

A review of the purpose statement of 4 CSR 240-22.050 confirms this conclusion:

PURPOSE: This rule specifies the methods by which end-use measures and demand-side programs shall be developed and screened for cost-effectiveness. . .

In addition, subsection (2)(C) specifically states: "Avoided costs shall be calculated as the difference in costs associated with a specified decrement in load large enough to delay the on-line date of the new capacity additions by at least one (1) year." (*Emphasis added*). SC/CCPC misunderstand this regulation.

During cross-examination of the SC/CCPC witness Ned Ford, it also became apparent that he was totally unaware that KCPL and other utilities had obtained a variance from compliance respecting the formal provisions of Chapter 22, including 4 CSR 240-22.050(2)(C).³⁴ As a result, the Commission concludes that KCPL was not required to comply with the formal rules of Chapter 22 during the term of the variance granted in Case Nos. EO-97-522 and EO-99-544.³⁵

For the reasons stated herein, the Commission finds and concludes that SC/CCPC's assertion that KCPL has violated 4 CSR 240-22.050(2)(C) is incorrect.

10. The Commission finds and concludes that the Commission has conducted a full, fair and meaningful hearing to consider the evidence and arguments of all parties, including SC/CCPC. The Commission finds and concludes that all parties have been afforded due process of law, and the Commission has fully and

³³ In its May 6, 2005 *Order Establishing Procedural Schedule*, the Commission stated that any issue not contained in the List of Issues that Staff was required to file would be viewed as uncontested and not requiring the Commission's resolution. The Commission notes that Staff did not list a potential Chapter 22 violation as an issue in its May 31 List of Issues. More telling, the Commission notes that Concerned Citizens of Platte County and Sierra Club also did not mention an alleged Chapter 22 violation in its June 2 Statement of Position, and only mentioned it for the first time in its June 15 prehearing brief. The Commission will, nonetheless, review CCPC/SC's argument *gratis*.

³⁴ (Tr. 372, 426-27), (Ex. No. 30, Order Approving Joint Agreement, *In re Application of Kansas City Power & Light Company's Electric Resource Plan, pursuant to 4 CSR 240-22, and its request for extension of time to file ERP*, Case No. EO-97-522 (July 18, 1997)); and (Ex. No. 31, Order Granting Joint Motion For Variance, *In re Application of St. Joseph Light & Power Company, The Empire District Electric Company, AmerenUE, Kansas City Power & Light Company, and Utilicorp United Inc. d/b/a Missouri Public Service Company for a Variance from the Provisions of 4 CSR 240-22*, Case No. EO-99-544 (May 20, 1999)).

³⁵ In addition, Section 386.550 RSMo prevents CCPC/SC from collaterally attacking those orders.

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carefully considered the competent and substantial evidence in the whole record. The Commission has put no limitations on the evidentiary proceedings in the instant case. In fact, the Commission is considering this case on a schedule which SC/CCPC agreed to, and when the SC/CCPC requested additional time to prepare for the evidentiary hearings, the Commission granted the request of SC/CCPC. The Commission also accorded each party an opportunity to submit a post-hearing brief, as well as a pre-hearing brief.

11. Based upon the competent and substantial evidence on the whole record, the Commission finds and concludes that the Stipulation filed on March 28, 2005, is in the public interest, and that the Commission should approve it. The Commission finds and concludes that the Stipulation's Experimental Regulatory Plan is a comprehensive framework that appropriately addresses the need for a cost-based but diverse resource adequacy program. Combining the best elements of proven and latest technology, coal-fired generation, environmental controls, renewable wind energy, and affordability, demand response and efficiency programs, the Experimental Regulatory Plan offers a reasonable proposal for safe and adequate service well into the future.

From a financial perspective, the Commission finds and concludes that the Stipulation adheres to traditional ratemaking principles. It calls for a maximum of four separate rate cases (Stipulation, Section III.B.3 at 29-44), a Class Cost of Service Study (Stipulation, Section III.B.3.a(vii) at 33), and continuous monitoring of KCPL's Resource Plan and of the construction process respecting Iatan 2 and the Iatan 1 and LaCygne 1 environmental enhancements. (Stipulation, Section III.B.1.q at 28).

The Signatory Parties have acknowledged that financial ratios play a role in a utility's ability to maintain its bonds at an investment grade rating. (Stipulation, Section III.B.1.i at 18-22). The Stipulation provides that KCPL must take prudent and reasonable steps to maintain its investment grade rating and must continue to manage costs, improve productivity and preserve service quality during the Experimental Regulatory Plan. (*Id.* at 19). Moreover, the Signatory Parties have agreed to support adding amortization amounts to KCPL's cost of service in rate cases when the projected cash flows resulting from KCPL's Missouri jurisdictional operations, as determined by the Commission, fail to meet or exceed that portion of the lower end of the top third of the BBB range shown in Appendix E; for reasons other than a failure to adhere to the conditions set out in the Stipulation regarding KCPL's necessary conduct. (*Id.* at 20). The Commission finds and concludes that these agreements are in the public interest and should be approved.

CONCLUSION

Based upon the competent and substantial evidence in the record in this case, the Commission finds and concludes that the KCPL Experimental Regulatory Plan encompassed in the Stipulation is in the public interest and is hereby approved.

IT IS THEREFORE ORDERED:

1. That the Proposed Experimental Regulatory Plan embodied in the Stipulation and Agreement filed in this case on March 28, 2005, as amended on July 26, 2005, is approved.

2. That the signatory parties shall abide by all of the terms and requirements in the March 28, 2005 Stipulation and Agreement.
3. That this case shall remain open for the Signatory Parties to report to the Commission after the Kansas Corporation Commission issues its decision regarding Kansas City Power & Light Company's Experimental Regulatory Plan.
4. That all pending motions are denied as moot.
5. That this Report and Order shall become effective on August 7, 2005.

Davis, Chm., Murray, Clayton and Appling, CC., concur;
Gaw, C., concurs, with concurring opinion to follow;
all certify compliance with the provisions
of Section 536.080, RSMo 2000.

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**OPINION OF COMMISSIONER STEVE GAW CONCURRING IN PART
AND DISSENTING IN PART**

I concur in part and dissent in part from the Commission's decision in the above captioned matter. I agree that Kansas City Power & Light Company's (KCPL) application for approval of a regulatory plan that facilitates the construction of a new coal generation unit is appropriate based on the evidence in the record. I base that decision on the weight of evidence that demonstrates the need for new generation and the type of generation (i.e., coal-fired baseload) most appropriate to satisfy that need. However, I have significant concerns as to some of the analysis undertaken, the lack of strong commitment to specific energy efficiency programs and the consequences of this state's failure to implement a comprehensive energy policy. In addition, I seek to note, through this opinion, the critical nature that the inclusion of margins from off-system sales plays in the overall acceptability of the joint recommendation.

The evidence before the Commission demonstrated expected load growth in the KCPL service area over the next several years and that this load growth results in a need for additional generation. The testimony offered from KCPL, Staff and OPC and supported by specific computer models indicated that coal-fired baseload generation like the proposed Iatan 2 facility would be the most cost effective way to meet this need. The offer of evidence from the two witnesses of Sierra Club and Concerned Citizens was general in nature and did not present the Commission with a viable alternative to the proposal in the joint recommendation. Because it appears that the projections of overall load growth were unchallenged¹, the

¹ The Sierra Club and Concerned Citizens pointed to growth rates in Missouri indicating little if any load growth. However, the load on the system overall appears from the evidence to be growing. KCPL's generation is dispatched for its system – not separately for Missouri and Kansas. Costs are then allocated from a financial perspective. It would not be efficient to build one system for Missouri and a separate system for Kansas. The overall costs for both Kansas and Missouri customers would hypothetically increase if the system were separated.

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evidence presented left very little choice but for the Commission to conclude that the Iatan 2 proposal was the most viable option.

I am concerned that the lack of verification of certain inputs used in the computer modeling, the results from which supported the joint recommendation. Like any resource plan, the proposal underlying this regulatory plan is based on assumptions. The accuracy of those assumptions is important to the ultimate accuracy of the conclusions of the computer model. During inquiry of Staff's witnesses, at times I lacked confidence in Staff's verification of those assumptions. Only the passage of time will permit the Commission to fully evaluate those assumptions. When information becomes available, it is important that KCPL, Staff, OPC and others verify whether the plan's course of action is achievable. Fluctuations in variables such as natural gas prices, transportation costs, environmental regulations, and technological developments from those utilized in the modeling may lead to needed changes in the plan. Thus, constant, regular monitoring and communication to the Commission is critical to moving forward.

In examining the choices of generation types, there was a lack of development of evidence on integrated gasification combined cycle (IGCC). Most of the testimony from KCPL and Staff on this subject gave a negative impression of this alternative. IGCC, however, provides hope for a cleaner way to use coal as fuel. It appears that at least one major electric utility is moving forward with plans on two 600 MW IGCC units. However, Staff and KCPL testified that this technology was not yet ready for deployment for a plant of Iatan's size. As Staff indicated:

This generation unit would represent a relatively large percentage of Kansas City Power & Light's needed capacity in the time frame soon after it's built, and years on out it continues to represent a significant percentage. Staff is uneasy with proceeding forth with a technology that, frankly, appears to need to do some maturing before it becomes the next resource.

And with that, I would say looking at IGCC, I think it represents a tremendous opportunity. I think it is probably the bridge technology to where we can begin to talk about potential zero emission plants, other technology that's being talked about, maybe an incremental step in overall efficiency.

It's very possible 10 to 15 years from now we may look back and say, you know, I wish we could have waited 10 to 15 years. But at this point in time with the information we have available, natural gas prices where they are and expectation for where they're going and some of the other sensitivities looked at in this model, I can't recommend that we wait those 10 to 15 years. It takes 5 years to build the unit. By the time it's built, we will very likely need all of its capacity.²

While Sierra Club and Concerned Citizens seemed at times supportive of IGCC they presented no evidence rebutting Staff and KCPL's assertion on viability and

² Tr. 619-620.

no detailed cost information. Such critical analysis of an alternative technology would have been helpful.

This aspect of the plan would be further improved with significant specific proposals for energy conservation to meet the expected KCPL load growth. While it is positive that efforts were made to discuss this issue and that some renewable energy in the form of wind generation will come into being as a result of this plan, the proposal could have been much stronger. Load demand can be met by additional generation and by increasing the efficiency of energy use. Both should be seen as energy resources. Energy efficiency is a domestic energy resource and usually better for the environment. Increasing the amount of load growth met with specifically detailed energy savings programs having planned implementation dates would have improved this plan.

This state needs a comprehensive energy policy that includes a mandatory or incentive-based renewable portfolio standard. Without such a state policy, the Commission continues to analyze new capacity and energy needs on a least cost basis that does not include valuations of long term health effects, economic costs of dwindling fossil resources and environmental consequences. Missouri can do better.

There was considerable testimony about off-system sales. At the public hearing, Witness Byron Combs delivered important data to the Commission regarding the level of these sales. While the data turned out to be gross sales and not net, it is clear that, except for the time frame after the explosion at the Hawthorn Plant, KCPL's off-system sales have been increasing. The trend infers that the increase in volume of off-system sales is an indication that the additional generation proposed is for the purpose of off-system sales and not really for use by KCPL's native load. If so, KCPL customers should not be forced to pay for this large investment which carries significant risk. However, the testimony given by Staff and KCPL countered such an inference. KCPL currently has substantial coal-fired baseload capacity in its system. This capacity was built over 25 years ago. With the recent increase in natural gas prices the comparative cost of coal generation to natural gas generation is much more favorable and lucrative. Thus, KCPL's opportunities to sell excess generation to others outside of its system have increased – as have the revenues. Taken alone, this evidence casts a shadow on the proposed latan 2 construction. However, the testimony was uncontroverted that the predicted native load growth will very soon cause KCPL's available generation for off-system sales to diminish and eventually disappear. The evidence indicates that additional generation to meet native load system requirements is needed over the next 5 years. KCPL Witness Grimwade testified:

A. If you know what – and just with everything else equal, over the next five years as we grow into base load, we'll see a relative decline in off-system sales.

And then when – ...

A. When latan II is built, we'll see a step up to some degree in the same amount of off-system sales and there will be a revenue associated with an incremental price that's a

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function of the growing, you know, as we see gas price escalate over that period of time the price of electricity will be reflective of that higher price for natural gas. And then we'll start declining down in terms of off-system sales as we grow into that amount of base load that's in the mix. ...

A I really can't get into exact percentages. I mean, we sell somewhere just slightly under, I think, around 5 million megawatt hours today – ...

A – for generation that I think is slightly around 20 – 20 million megawatt hours. Give you a frame of reference. So we'll grow into that over the next five years and then we'll see probably an increase in off-system sales that will probably reflect something close to what we have today. I don't think it will go a whole lot higher than that from what I've seen.³

Finally, it is very important to note that Iatan 2 construction again creates capacity for potential off-system sales. The credibility of those sales to the benefit of KCPL customers is critical to the Staff's favorable recommendation in the Nonunanimous Stipulation. Mr. Schallenberg testified:

Q. The off-system sales provisions, in regard to Iatan II, then, are very important – this provision is very important to what occurs with those – those sales, this provision. I mean, the one dealing with off-system sales and how long it goes?

A. Its very important in terms of the consideration as to what cost of the consideration as to what the cost of Iatan II would be to customers.

Q. Yes. And when you said earlier that off-system sales were very important in Staff signing off on this agreement, was Staff – did Staff make an assumption in regard to whether or not off-system sales from Iatan II would be credited to customers in signing the agreement?

A. Yes. In fact, it would be used as an offset to the cost. When you put in the cost of Iatan II, in order to determine its true cost to customers off-system sales, and actually off-system sales margins would be used in that determination of ultimate cost would be passed through in rates.⁴

KCPL consumers who are paying for this plant deserve and will be credited for amounts representing any margins associated with off-system sales. If this were not so, this plan should not be approved. If the credit for off-system sales is diverted from consumers in the future, it will be in violation of the understanding of this

³ Tr. 1008-1009.

⁴ Tr. 1035-1036.

Commissioner and will amount to taking from KCPL customers what is rightfully theirs.

For these reasons I concur in part and dissent in part from the decision of the Commission.

In the Matter of The Empire District Electric Company's Application for Certificate of Public Convenience and Necessity and Approval of an Experimental Regulatory Plan Related to Generation Plant.

Case No. EO-2005-0263

Decided August 2, 1005

Electric §20. The Commission found that the experimental regulatory plan provides a framework that should lead to reasonable rates during the expected five-year duration of the construction. The method the signatory parties used to get to those expected reasonable rates is additional amortization. The additional amortization should result in lower capitalized costs during construction, and therefore will result in a lower future rate base upon which customers must pay a return on.

Electric §30. The Commission found that the experimental regulatory plan should include the construction of a coal-fired baseload plant. The plant would be the lowest cost option to adequately and safely serve the projected need for additional baseload capacity.

Electric §34. The experimental plan that the Commission approved included investments for accelerated compliance with environmental regulations. The investments are for equipment that is to reduce site emissions of sulfur dioxide. Also, the investments are for a selective catalytic reduction facility and a gas-fired peaking plant.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the Stipulation and Agreement entered into among The Empire District Electric Company, the Staff of the Commission, the Office of the Public Counsel, Explorer Pipeline Company, Praxair, Inc., and the Missouri Department of Natural Resources with regard to Empire's participation in building the Iatan 2 generation plant, and making environmental upgrades to other plants.

Background

On February 4, 2005, Empire filed its Application with the Missouri Public Service Commission under Sections 386.250, 393.140, 393.170, 393.230 and 393.240, RSMo. Empire asked the Commission to approve its experimental regulatory plan concerning its possible participation in the Iatan 2 steam electric generation station, making environmental upgrades to other plants, and a certificate of convenience and necessity to participate in Iatan 2, if necessary.

Empire's Application asked the Commission to find that:

- Empire is allowed to maintain its debt at investment grade, and is able to adequately participate in the equity market;

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- the Commission should not exclude Iatan Unit 1 and Asbury environmental upgrade investments from rate base on the ground that the projects were not necessary or timely or that Empire should have used alternative technologies;
- Empire's ownership of up to approximately 150 MW of new generation capacity at the Iatan site would have long-term benefits for maintaining competitively priced electricity for Missouri consumers and that the Commission should not exclude Empire's investment in Iatan Unit 2 and its V84 Combustion Turbine at Riverton from rate base on the ground that the projects were not necessary or timely, or that Empire should have used alternative technologies;
- the Signatory Parties¹ may agree to additional amortizations for Empire to help effectuate Empire's investment grade ratings during construction of Iatan 2;
- depreciation and amortization rates affect cash flow, and hence the ability to maintain investment grade status; thus, the Commission should review Empire's depreciation and amortization rates accordingly in Empire's future rate cases; and
- Empire may use the fuel and purchase power cost recovery mechanism authorized in Senate Bill 179² to recover fuel costs.

On April 12, the Commission directed that notice of Empire's Application be given to the public. The Commission allowed Praxair, Explorer, DNR, Union Electric Company d/b/a AmerenUE, Kansas City Power & Light Company, and Aquila, Inc., to intervene.

On June 22, Empire filed prepared direct testimony in support of its Application. On June 28, Empire amended its application and explained its proposed experimental regulatory plan in greater detail.

On July 18, 2005, Empire, the Staff of the Commission, the Public Counsel, Explorer, Praxair and DNR filed a Stipulation and Agreement (Agreement), which is Attachment 1 to this order. The Agreement purports to resolve all issues among the signatory parties.

The Stipulation and Agreement

The Agreement is among less than all parties to this case. But AmerenUE, KCPL and Aquila (all of the non-signatory parties) state that they do not oppose the Agreement and do not request a hearing.

The Agreement suggests that the Commission approve an experimental regulatory plan for Empire related to its participation in Iatan 2. Iatan 2 is a proposed new coal-fired generation unit with 800-900 MW of capacity to be located at the Iatan site near Weston, Missouri. KCPL is to construct Iatan 2.

The Agreement contains conditions related to:

- Empire's infrastructure investments, including Iatan 2, environmental investments in Iatan 1, a 155 MW gas-fired peaking plant in Riverton, Kansas, and

¹ The Signatory Parties are Empire, the Staff of the Commission, Public Counsel, Explorer, Praxair, and the Department of Natural Resources.

² Act of April 27, 2005, 93rd General Assembly, SS SCS SB 179 (to be codified at § 386.266 RSMo, effective January 1, 2006).

installing Selective Catalytic Reduction equipment at the Asbury coal-fired generating station;

- Treatment of various issues in Empire's rate cases between now and when the investments related to Iatan 2 are reflected in rates, including an agreement that the signatory parties will not claim that the decision to build Iatan 2 was not prudent, but that they reserve the right to claim in a rate case that some or all of the expenses Empire incurs to build Iatan 2 are not prudent;
- The signatory parties' agreement to support, if necessary, an amortization that will minimize the cost of the plan while seeking to provide adequate cash flow for Empire to maintain its debt at investment grade;
- Empire's agreement to rely solely on Senate Bill 179 to recover its fuel and purchased power costs;
- Provisions related to Empire treating its off-system sales and transmission-related revenues "above the line" for ratemaking purposes for as long as its related investments and expenses are considered in determining rates;
- Provisions related to sulfur dioxide (SO₂) emission allowances;
- A detailed resource plan process for future needs; and
- A customer program collaborative process related to affordability, efficiency and demand response programs.

On July 21 and 22, 2005, the Commission held a hearing concerning the Agreement.

Discussion

The Commission has the legal authority to accept a stipulation and agreement to resolve a case.³ The Commission notes that "[e]very decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement . . . shall include . . . findings of fact and conclusions of law."⁴ Consequently, the Commission need not make findings of fact or conclusions of law in this order.

If no party objects to a stipulation and agreement, the Commission may treat the Agreement as unanimous.⁵ Because all parties have either signed the Agreement filed on July 18, 2005 or stated that they do not oppose the agreement, the Commission will treat the Agreement as unanimous.

KCPL has identified Empire as a "preferred potential partner in the Iatan 2 generating plant project" if Empire has a "commercially feasible financing plan for meeting [its] financial commitments to participate in the ownership of the Iatan 2 plant by the later of August 1, 2005 or such date that KCPL shall issue its request(s) for proposal(s) related to Iatan 2."⁶ On June 10, 2005, Empire entered into a Letter

³ See Section 536.060, RSMo 2000.

⁴ Section 536.090, RSMo 2000.

⁵ 4 CSR 240-20115(2)(C).

⁶ Gipson Direct Ex. 2, p. 5).

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of Intent with KCPL for a preferred capacity of 150 MW and a minimum allocation of 100 MW ownership in Iatan 2. The LOI is contingent upon providing an acceptable financing and regulatory plan and the execution of acceptable ownership, operating and common facility agreements.⁷

The Agreement assists Empire in meeting its needs for generation so that it can achieve its energy and capacity requirements. This Agreement gives Empire an opportunity to own at least 100 MW of coal-fired generation to be built in Missouri.

The Agreement strikes a reasonable and appropriate balance between the interests of Empire's customers and shareholders regarding Empire's participation in Iatan 2. The Agreement is designed to positively impact Empire's credit ratings. Thus Empire should have lower debt costs to pass on to consumers in the form of lower future rates.

Furthermore, the Agreement is designed to give Empire the opportunity to maintain its investment grade ratings during the term of the experimental regulatory plan, which is important to Empire's shareholders and creditors. This Agreement also protects Empire's customers from potential imprudent or unreasonable actions by recognizing that the Commission may disallow expenses, including, but not limited to, "generation investments . . . , related costs and off-system sales margins on the ground that Empire failed to acquire more coal-fired resources at an earlier date,"⁸ in rate cases Empire may file.

The Commission has reviewed the First Amended Application, the Agreement, and the evidence received at the hearing. Based upon its review, the Commission concludes that the Stipulation and Agreement filed on July 18, 2005 is in the public interest. The Commission will therefore approve the Agreement and direct that the parties to the Agreement comply with its terms.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement entered into among The Empire District Electric Company, the Staff of the Commission, the Office of the Public Counsel, Explorer Pipeline Company, Praxair, Inc., and the Missouri Department of Natural Resources, on July 18, 2005, is approved.
2. That the parties to the Stipulation and Agreement shall comply with its terms.
3. That this order shall become effective on August 12, 2005.
4. That this case may be closed on August 13, 2005.

Davis, Chm., Murray, Clayton and Appling, CC., concur
Gaw, C., concurs in part; dissents in part; dissent to follow

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

⁷ *Id.* at 6.

⁸ Stipulation and Agreement, Section III.C.7, page 5.

**OPINION OF COMMISSIONER STEVE GAW CONCURRING IN PART
AND DISSENTING IN PART**

I concur in part and dissent in part with the Commission's decision approving the Stipulation and Agreement in this case. It is apparent that Empire needs to add baseload generation to its system in light of its current heavy dependence on natural gas-fired generation. As such, adding capacity from the Iatan 2 generating facility is a move in the right direction. Despite this positive aspect, what is disturbing is that, instead of resulting in an increase in the percentage of baseload capacity for Empire, the regulatory plan envisions a best case scenario that actually produces a baseload capacity percentage decrease.

The reason underlying the declining baseload capacity percentage is easily understood. Empire's need for baseload generation has been documented for over 12 years. In early 1993, Empire was contacted by Ahlstrom Development Corporation with a proposal by which Ahlstrom would build a small power production facility which would utilize unreclaimed waste coal and petroleum coke as fuel.¹ Projected to be completed in the year 2000, Empire would purchase either 160 or 260 MWs of power for a period of 25 years and would then be given the option of assuming ownership of the facility. Evidence in that case indicates that, despite its need for baseload capacity, Empire would not even engage in meaningful negotiations.²

In its testimony, Empire asserted that the purchased power costs of the Ahlstrom project were too expensive relative to other available baseload capacity options. Instead, Empire claimed that it had recently entered into a 10 year agreement to purchase 162 MWs of capacity from Western Resources (WRI). Empire maintained, and the Commission ultimately agreed, that the WRI agreement represented a lower cost alternative and that Empire should not be required to execute an agreement with Ahlstrom.

While the WRI contract may have been a cheaper alternative in the short run, it did not represent a permanent solution. Instead the WRI agreement only provided for baseload capacity and energy for a period of 10 years. As envisioned by the Order, however, it was the Commission's belief that Empire's management would use the intervening time period to identify, finance, and construct a baseload facility to be available upon the expiration of the WRI agreement.³ Clearly, Empire has not used that intervening time period as envisioned by the Commission. Rather than seeking the baseload capacity, Empire engaged in a strategy of heavy investment

¹ *Ahlstrom Development Corporation, and Cottonwood Energy Partners, L.P. v. The Empire District Electric Corporation*, 4 Mo.P.S.C. 3d 187 (1995).

² *Id.* at 192.

³ The Commission specifically found that the most appropriate determination of Empire's avoided cost was based upon the WRI 10 year power purchase agreement combined with a 160 MW baseload unit to be available immediately upon the expiration of the WRI contract. Based upon the 45 year costs for the combined power purchase agreement & baseload addition, the Commission found that "Empire's 45-year avoided is substantially less than the costs associated with either Ahlstrom proposal".

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in natural gas-fired intermediate and peaking facilities.⁴ It is this decision of Empire's management to invest in natural gas generation that is now haunting Empire ratepayers, has led to a succession of Empire rate increases, and should be the subject of future Commission scrutiny.

Staff Witness Wood testified that, even using Staff's conservative load growth predictions, the addition of the Iatan 2 generation will leave Empire far below an optimal generation mix with an over-dependence on expensive gas-fired intermediate and peaking generation facilities. With the recent passage of SB 179, Empire shareholders and management bear less accountability for the utility's decision to become increasingly dependent on natural gas generation. Whereas the utility would have once bore the volatility risk of investing heavily in a particular source of electric generation, SB 179 now shifts that volatility risk and the high fuel costs associated with running gas turbines to the consumers.

Perhaps foreshadowing the current generation situation faced by Empire, the Commission, in its Ahlstrom decision, specifically warned Empire that its generation procurement decisions should be subject to future prudence determinations.

The Commission's finding as to Empire's avoided cost should not be construed as a limitation upon the ability of parties to attack the prudence of the WRI agreement or Iatan 2 charges in connection with future electric rate cases of Empire or other electric utilities. In particular, in all likelihood Empire's revenue requirement will be affected by the WRI agreement in future Empire rate proceedings. The Commission's finding in the instant proceeding with respect to Empire's avoided costs does not limit the ability of any party to attack the prudence of costs incurred under the WRI agreement in the context of future Empire rate proceedings.⁵

It is this Commissioner's belief that the Empire generation procurement decisions, based upon a heavy dependence on natural gas and peaking facilities should finally be scrutinized. Empire's failure to arrange for baseload capacity to be available upon the expiration of the WRI purchase power agreement has likely resulted in higher rates to the Empire ratepayers. The rationale underlying Empire's: (1) failure to arrange for baseload capacity and (2) decision to continue to invest in natural gas-fired peaking and intermediate facilities should be subjected to some test of reasonableness.

Along these lines and perhaps most troubling is that this Stipulation seems to approve the construction of an additional gas-fired peaking facility to the Empire system. As mentioned, Empire is already heavily dependent on natural gas. Recognizing the current natural gas prices, I cannot vote for an Order that continues to dig a deeper hole for Empire's customers.

⁴ Information provided in recent rate proceedings indicates that Empire added: (1) a 90 MW gas-fired State Line Unit 1, (2) 2-50 MW gas-fired Energy Center jet engines, and (3) a 300 MW gas-fired State Line Unit 2 combined cycle.

⁵ *Id.* at 197.

The Office of the Public Counsel and Staff seem to have attempted to preserve an argument on the prudence of Empire decisions on fuel mix while allowing the gas turbine to be a part of the Regulatory Plan. This creates the potential for confusion in a rate case where the gas-fired turbine is challenged as a part of Empire's choice of generation mix. Empire seems to acknowledge some preservation of this argument in future rate cases. However, it would seem much cleaner to have simply omitted the gas turbine from the regulatory plan approved in the Stipulation in this case.

In the Matter of the Application of Aquila, Inc., for Approval of Its Experimental Regulatory Plan and for a Certificate of Convenience and Necessity Authorizing It to Participate in the Construction, Ownership, Operation, Maintenance, Removal, Replacement, Control and Management of a Steam Electric Generating Station in Platte County, Missouri, or Alternatively for an Order Specifically Confirming That Aquila, Inc. Has the Requisite Authority under Its Existing Certificate(s).

Case No. EO-2005-0293
Decided August 9, 2005

Electric § 30. The Commission authorized Aquila to encumber some of its regulated assets to secure low-cost financing to be a partner in the construction of a coal-fired baseload plant. The plant would be a cost-effective option to adequately and safely serve the projected need for additional baseload capacity.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the unopposed Stipulation and Agreement entered into among Aquila, Inc., the Staff of the Commission, the Office of the Public Counsel, and Sedalia Industrial Energy Users' Association, and grants Aquila authority with regard to its participation in the latan 2 generation plant and latan 1 environmental upgrades.

Background

On March 2, 2005, Aquila filed its Application with the Missouri Public Service Commission under §386.250, 393.140, 393.170, 393.230 and/or 393.240, RSMo (2000) and Commission rules 4 CSR 240-2.060, 3.105 and 3.110. Aquila amended the Application on May 23, 2005, and again on June 10, 2005.

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Aquila's Second Amended Application asked for authority to encumber its MPS assets. Aquila wants to use those assets as collateral to support a \$300 million senior secured term loan. That loan would be for construction financing for its ownership interest in Iatan Unit 2, and for environmental upgrades related to its existing ownership interest in Iatan Unit 1. Further, Aquila asked the Commission for a finding that encumbering those properties to secure its obligations under the term loan facility is not detrimental to the public interest.

On March 8, 2005, the Commission directed that notice of Aquila's Application be given to the public. Sedalia Industrial Energy Users' Association (SIEUA), the Missouri Department of Natural Resources, Union Electric Company d/b/a AmerenUE, Kansas City Power & Light Company, The Empire District Electric Company, and Calpine Central L.P., asked to intervene. The Commission granted all of the requests except for Calpine's.

On July 18, 2005, Aquila, Staff, Public Counsel, and SIEUA filed a Stipulation and Agreement. The Agreement purports to resolve all issues among the signatory parties. AmerenUE, KCPL, Empire and DNR (all the parties that did not sign the Agreement) stated that they do not oppose the Agreement, and do not request a hearing.

The Stipulation and Agreement

The Agreement suggests that the Commission approve Aquila's Second Amended Application. The Commission's approval would enable Aquila to put in place construction financing related to its participation in Iatan Unit 2 and environmental upgrades to Iatan Unit 1. Iatan 2 is a proposed new coal-fired generation unit with 800-900 MW of capacity to be located at the Iatan site near Weston, Missouri. Iatan 2 is to be constructed by KCPL. Iatan Unit 1 is an existing generation unit in which Aquila holds an 18% ownership interest.

A summary of the Agreement, which is attached to this order, is as follows:

- Aquila would be obligated to invest in upgrading Iatan 1 and in building Iatan 2;
- Aquila would be limited to using the proceeds from the term loan facility solely for its participation in Iatan 1 upgrades and Iatan 2 construction;
- Aquila's successors would be obligated to fulfill Aquila's obligations under the Agreement;
- The parties reserve their rights concerning what costs, if any, the Commission may allow Aquila to recover from ratepayers for participating in the Iatan 1 and 2 projects.

On August 1, 2005, the Commission held a hearing concerning the Agreement.

Discussion

The Commission has the legal authority to accept the Agreement to resolve this case.¹ The Commission notes that "[e]very decision and order in a contested

¹ Section 536.060, RSMo 2000.

case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement . . . shall include . . . findings of fact and conclusions of law.”² Consequently, the Commission need not make findings of fact or conclusions of law in this order.

If no party objects to an agreement, the Commission may treat it as unanimous.³ Because all parties have either signed the Agreement or stated that they do not oppose it, the Commission will treat it as unanimous.

Aquila needs coal-fired generation to meet its energy and capacity requirements. It also needs to increase its baseload capacity to mitigate the effects of high natural gas prices, and as a cost-effective means of providing electric service to its Missouri jurisdictional customers. KCPL has identified Aquila as a “preferred potential partner in the Iatan 2 generating plant project” if Aquila has a “commercially feasible financing plan for meeting [its] financial commitments to participate in the ownership of the Iatan 2 plant by the later of August 1, 2005, or such date that KCPL shall issue its request(s) for proposal(s) related to Iatan 2.”⁴

On June 16, 2005, Aquila entered into a Letter of Intent (LOI) with KCPL for at least 140 MW ownership in Iatan 2. The LOI is contingent upon providing an acceptable financing plan and the execution of acceptable ownership, operating and common facility agreements. In the Agreement, Aquila agrees to participate at an ownership level of approximately 140 MW of the planned 800-900 MW generation capacity of Iatan Unit 2.

The Agreement gives Aquila an opportunity to participate as an owner of at least 140 MW of coal-fired generation to be built in Missouri for its regulated electric operations in Missouri, and to finance construction of environmental upgrades to Iatan Unit 1. The Agreement also contains provisions to restrict Aquila’s use of the loan proceeds for anything other than the Iatan projects. Also, in the event of a sale of all or any portion of Aquila’s interest in Iatan Units 1 or 2, the Agreement provides for the assumption of liabilities and use of the proceeds of any such sale to “pay down” financing related to the purchased facility.

The Agreement allows Aquila to encumber its Aquila Networks – MPS division’s assets as security for a five-year loan to be used solely for Aquila’s participation in the construction of Iatan Unit 2 and environmental upgrades to Iatan Unit 1. Construction is planned to be complete in 2010. The loan has a term of five years; thus, when the loan expires near the time construction is complete, Aquila Networks – MPS division assets will no longer be encumbered by the loan.

The Commission’s authority over Aquila’s encumbering its Missouri assets that are necessary or useful in serving the public is found in Section 393.190, RSMo 2000. That statutory section does not include an explicit standard of review.

² Section 536.090, RSMo 2000.

³ Commission Rule 4 CSR 240-2.115(2)(C).

⁴ Case No. EO-2005-0329, Stipulation and Agreement, §III.B.9, page 51.

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However, this Commission recently stated in an Aquila financing case, “[t]he Commission has already concluded that it should approve Aquila’s request if doing so would not be detrimental to the public interest.”⁵ The Commission has reviewed this Agreement under that same standard of not detrimental to the public interest.

The Commission notes that Aquila’s request is different from its request to encumber assets in Case No. EF-2003-0465. In the present case, the request is specifically for the purpose of providing service to Aquila’s ratepayers through investment in new generation. In Case No. EF-2003-0465, the loan was a result of the unregulated activities of Aquila.

The Agreement strikes a reasonable and appropriate balance between the interests of Aquila’s customers and shareholders in relation to Aquila’s participation in building latan 2 and upgrading latan 1. There is no indication that the Agreement, if approved, would have a negative impact on Aquila’s credit ratings. Also, Aquila should experience lower debt costs by using secured financing.

The Commission has reviewed the Second Amended Application, the Agreement, and the evidence. Based upon its review, the Commission concludes that the Agreement is not detrimental to the public interest. The Commission will therefore approve the Agreement and direct that the signatory parties comply with its terms.

By approving the Agreement, the Commission does not authorize the exercise of any creditor’s remedy to foreclose on or sell assets encumbered if Aquila is in default on its obligations under the term loan. The specific terms of the mortgage document are being negotiated and were not available at the time of the hearing. Consequently, the Commission has not had the opportunity to review specific terms, including the standard terms typically associated with the exercise of any creditor’s remedy that would involve the taking, sale or assignment of any of Aquila’s franchise, works or system. The Commission wishes to make clear that it is not waiving its authority, including its authority under Section 393.190.1, RSMo 2000, to review the transfer, sale or assignment of any of Aquila’s franchise, works or system necessary or useful in serving the public. The Commission will order Aquila to file and serve all parties in this case with a copy of the executed mortgage document and provide all parties to the mortgage document a copy of this Order Approving Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. The encumbrance of the electric utility properties of the Aquila Networks – MPS division of Aquila to support a senior secured five-year multi-draw term loan consistent with that described in the Appendix to the July 18, 2005 Stipulation and Agreement is not detrimental to the public interest and is authorized and approved.

2. That the Stipulation and Agreement entered into between Aquila, Inc., the Staff of the Commission, the Office of the Public Counsel, and Sedalia Industrial Energy Users’ Association on July 18, 2005, is approved.

⁵ *In the Matter of Aquila, Inc.*, Case No. EF-2003-0465, Report and Order, page 6 (February 24, 2004).

3. That the Second Amended Application filed by Aquila, Inc., on June 10, 2005, is approved subject to the agreements, limitations, conditions and obligations set forth in the July 18, 2005 Stipulation and Agreement.

4. That the parties to the Stipulation and Agreement shall comply with its terms.

5. That Aquila, Inc., shall file and serve all parties in this case with a copy of the executed mortgage document and Aquila shall provide all parties to the mortgage document a copy of this order.

6. That this order shall become effective on August 19, 2005.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur
Pridgin, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of an Investigation into Natural Gas Incidents in
Unionville and Milan, Missouri, on Systems Operated by
West Central Energy.**

*Case No. GS-2005-0246
Decided August 23, 2005*

Gas §35. This order closes the gas safety case involving West Central Energy. WCE has responded to the natural gas safety problems effectively and has taken the appropriate steps to minimize the risk of ice accumulating on vital service regulators. Therefore, Commission closes this case.

ORDER CLOSING CASE

Syllabus: This order closes the gas safety case involving West Central Energy.¹

On January 27, 2005, the Commission received a Motion to Establish Case. The Commission granted that motion on February 3.

Staff filed its Report on June 17. The report detailed Staff's opinion concerning natural gas incidents that occurred on January 5, 2005, in WCE's gas distribution system.

WCE operates natural gas distribution systems for, among other cities, Unionville and Milan. On January 5, 2005, homes in those two cities were damaged due to natural gas explosions. Staff reported the probable cause of the explosions was over-pressurization of natural gas water heaters due to service regulator malfunction. In turn, the probable cause of the service regulator malfunction was an unusually large amount of ice accumulation on those regulators. Both of the

¹ According to the Staff's Report filed on June 17, West Central Energy became Utility Safety & Design, Inc., on May 1, 2005. For consistency's sake, Staff and the Commission will refer to the investigated party as West Central Energy or WCE.

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regulators were directly below roof overhangs that did not have gutters, which resulted in large amounts of water dripping directly onto the regulators.

Staff investigated the explosions, and found that WCE had not violated any of the Commission's gas safety rules. Even though Staff believed that WCE did not violate any Commission rules, Staff recommended that WCE do five things to prevent more natural gas incidents. Those five recommendations are:

- WCE shall annually monitor meter set locations that might be susceptible to ice build up on service regulating equipment during the early fall of each year when possible;
- WCE shall review its current annual liaison program with emergency responders to improve the level of communication, so gas facilities can be safely secured in the event of a potential gas incident;
- WCE shall review its public education program to determine how to better educate their customers on how to identify and report ice accumulation on natural gas meter sets;
- WCE shall submit its proposed additional customer information for Staff's review;
- WCE shall respond to Staff's recommendations, indicating whether it agrees with the recommendations.

WCE responded on July 27. That response included WCE's change of its Operating and Maintenance Plan concerning turn-on and reinstatement of distribution of service lines and patrolling service lines, and its proposed customer notice concerning ice accumulation on service regulators.

Staff filed a Memorandum to the Commission on August 15. Staff stated that it is satisfied with WCE's response toward its five recommendations, and that WCE has taken the appropriate steps to minimize the risk of ice accumulating on vital service regulators. Therefore, Staff recommends that the Commission close this case.

The Commission has reviewed the pleadings, and finds that no further investigation is needed. The Commission will close this case.

IT IS THEREFORE ORDERED:

1. That the Commission will close this case.
2. That this order shall become effective on September 2, 2005.
3. That this case shall be closed on September 3, 2005.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Pridgin, Regulatory Law Judge

**In the Matter of a Proposed Regulatory Plan of Kansas City
Power & Light Company.***

*Case No. EO-2005-0329
Decided August 23, 2005*

Electric §1. On July 28, 2005, the Commission issued its Report and Order approving Kansas City Power and Light's Experimental Regulatory Plan which was included in the March 28, 2005 Stipulation and Agreement submitted to the Commission. The Agreement and Report and Order allowed KCPL to amend their agreement to correspond with the agreement filed in Kansas, which was part of the record before the Missouri Commission's hearing. The Commission approved the amendments without further hearing.

**ORDER APPROVING AMENDMENTS TO
EXPERIMENTAL REGULATORY PLAN**

On March 28, 2005, Kansas City Power & Light, the Staff of the Commission, the Office of the Public Counsel, Missouri Department of Natural Resources, Praxair, Inc., Missouri Industrial Energy Consumers, Ford Motor Company, Aquila, Inc., The Empire District Electric Company, and Missouri Joint Municipal Electric Utility Commission (collectively referred to as "Signatory Parties") submitted a Stipulation and Agreement. That agreement included an Experimental Regulatory Plan.

On July 28, the Commission issued its Report and Order. That order approved the Experimental Regulatory Plan. The agreement and the Report and Order allowed the signatory parties to adopt provisions of a similar agreement pending before the Kansas Corporation Commission.¹

On August 5, KCPL filed the KCC order that approved of KCPL's Kansas experimental regulatory plan.² On August 12, Staff, Public Counsel, Department of Natural Resources and Praxair filed their Proposed Amendment of the KCPL Experimental Regulatory Plan. That pleading included an appendix that detailed the proposed amendments to the stipulation and agreement.

On August 16, KCPL responded. KCPL agreed to the proposed amendments. KCPL also stated that the Kansas stipulation and the differences between the Kansas stipulation and Missouri stipulation were part of the record the Commis-

* The Commission, in an order issued on August 23, 2005, denied a motion for rehearing in this case. This case was appealed to Cole County Circuit Court (05ACCC00917). See pages 326 and 568 for other orders in this case.

In an order issued on April 27, 2006, in Case No. EO-2006-0281, the Commission approved an application for an extension of time to comply with the provisions of the stipulation and agreement in Case No. EO-2005-0329 concerning installation of wind measuring equipment.

¹ *Stipulation and Agreement*, pp. 49-50 (March 28, 2005); *Report and Order*, p. 42 (July 28, 2005).

² *In re Kansas City Power & Light Company, Order Approving Stipulation and Agreement*, KCC Docket No. 04-KCPE-1025-GIE (August 5, 2005).

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sion used to issue its Report and Order.³ Because the Kansas stipulation was part of the record well before the Commission's hearing, KCPL argues that the Commission can approve the proposed amendments without further hearing.

Proposed Amendments

The proposed amendments to which the above parties agree are as follows:

a. Language for Case No. EF-2005-0498:

" . . . KCPL will file with the Commission within ten (10) days of the issuance of any debt securities authorized pursuant to this proceeding, a report including the amount of debt securities issued, date of issuance, interest rate (initial rate if variable), maturity date, redemption schedules or special terms, if any, and use of proceeds. With regard to such debt, KCPL agrees that it will abide by the conditions and restrictions set forth by the Federal Energy Regulatory Commission in its Order issued February 21, 2003, in Docket No. ES02-51-000."⁴

b. Page 19, first paragraph on page, revised last sentence as indicated by the underlined words:

" . . . KCPL further recognizes that any finding by the Commission that KCPL has failed to prudently manage its costs, continuously improve productivity, and maintain service quality during the Regulatory Plan will negate the obligation of the non-KCPL Signatory Parties contained in this section."

c. Page 19, second paragraph on page, new last sentence to be added:

" . . . The non-KCPL Signatory Parties reserve the right to recommend "Additional Amortizations to Maintain Financial Ratios" amounts in each rate case such that these amounts in aggregate do not exceed the expected cost savings from the amortization mechanism and the lower costs of capital resulting from the investment grade ratings."

d. Page 19, second paragraph on page, new third to last sentence to be added:

" . . . The accumulated "Additional Amortizations To Maintain Financial Ratios" amounts will be treated as increases to the depreciation reserve and be deducted from rate

³ *Joint Motion to Approve Stipulation and Agreement*, (April 28, 2005); *Staff Suggestions in Support of Stipulation and Agreement*, Appendix 2 (May 10, 2005).

⁴ Although the parties did not state how EF-2005-0498 should be amended, this language appears to be an amendment to paragraph 18 of KCPL's application.

base in any future KCPL rate proceedings, beginning with the first rate case after the 2006 Rate Case. . . .”

e. Page 26, top of the page:

“(xiv) material changes in the projected rates and costs to ratepayers resulting from the Resource Plan.”

f. Page 26, first full paragraph, new first sentence to be added:

“KCPL will on its own or upon request of any non-KCPL parties re-assess the reasonableness and adequacy of the Resource Plan if changed circumstances arise that may impact the reasonableness and adequacy of the Resource Plan during the initial and ongoing implementation of the primary elements of the Resource Plan.”

g. Page 26, first full paragraph, revised sentence:

“If KCPL determines that its Resource Plan should be modified because changed factors or circumstances have impacted the reasonableness and adequacy of the Resource Plan, then it shall file notice with the Commission and notify all Signatory Parties in writing within ten (10) days of any such determination.”

h. Page 26, second paragraph, new last sentence to be added:

“. . . Any agreement concerning modification of the resource plan shall be filed with the Commission.”

i. Page 27, new paragraph to be added after first full paragraph:

“In order to provide more assurance that future generation or power supply, including Demand Side Management resources, are acquired at the most reasonable cost and to establish a benchmark of reasonable costs, KCPL agrees that its process for considering or acquiring future resources in addition to those contemplated by this Resource Plan shall include the issuance of a Request for Proposal (RFP) for the supply of such resource by competitive bid. KCPL agrees to consult with the Staff and Public Counsel in the design and content of the RFP before it is issued.”

j. Page 45, new bullet point to be added after the first bullet point on the page:

“KCPL contemplates the possibility of building a railroad bridge for coal deliveries to the Iatan site. The bridge will not be considered a part of the Resource Plan contained in this

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Agreement. Should KCPL build the bridge, the Signatory Parties reserve the right to take any position on the revenue requirement related to the bridge in a future rate case. KCPL will consult with the Staff and Public Counsel regarding its negotiations for coal delivery arrangements and the need for the bridge before making a decision regarding the bridge."

k. Page 45, new second sentence in bullet point for wind generation to be added:

"As part of the determination respecting proceeding with the construction of the second 100 MW investment in new wind generation, KCPL will issue a Request for Proposal (RFP) for a twenty-year (20-year) purchase power agreement (PPA) for wind generation from independent third parties on a cost per kilowatt-hour basis, which includes any expected tax credits."

l. Page 46, new first paragraph to be added at the beginning of III.B.5:

"In calendar years 2005 through 2009, KCPL commits to implement Demand Response, Efficiency and Affordability programs, subject to the continuing review and prior approval of the Commission on a program-by-program basis. No program will be implemented until such Commission approval has been obtained through the tariff filing process."

m. Page 29, new paragraph to be added after first full paragraph in III.B.5:

"KCPL recognizes that if generation assets are deregulated in the future, it is at risk for recovery of stranded costs related to the acquisition of the new generation. Furthermore, KCPL acknowledges that ratepayers would be entitled to a greater share of a gain on the disposition of the new generation upon deregulation due to possible implementation of the "Additional Amortizations To Maintain Financial Ratios" mechanism."

n. Page 29, second new paragraph to be added after first full paragraph in III.B.5:

"For purposes of determining the cost of debt in the rate proceedings during this Agreement, the lower of the actual cost of debt or the cost of debt for an investment grade rating will be used."

The Commission has already reviewed and approved the parties' original Stipulation and Agreement. That agreement included provisions allowing the

parties to amend their agreement to comport with the agreement filed in Kansas. The Commission will therefore approve these amendments without further hearing.

IT IS THEREFORE ORDERED:

1. That the proposed amendments to the March 28, 2005 Stipulation and Agreement, listed above under "Proposed Amendments," are approved.
2. That this order shall become effective on August 23, 2005.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Pridgin, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

DIGEST OF REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF THE

STATE OF MISSOURI

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ACCOUNTING**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Jurisdiction and powers of the Federal Commissions
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- §5. Reports, records and statements
- §6. Vouchers and receipts

II. DUTY TO KEEP PROPER ACCOUNTS

- §7. Duty to keep proper accounts generally
- §8. Uniform accounts and rules
- §9. Methods of accounting generally

III. PARTICULAR ITEMS

- §10. Additions, retirements and replacements
- §11. Abandoned property
- §12. Capital account
- §13. Contributions by utility
- §14. Customers account
- §15. Deficits
- §16. Deposits by patrons
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- §18. Financing costs
- §19. Fixed assets
- §20. Franchise cost
- §21. Incomplete construction
- §22. Interest
- §23. Labor cost
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ACCOUNTING

- §37. Supervision and engineering
- §38. Taxes
- §38.1. Book/tax timing differences
- §39. Welfare and pensions
- §39.1. OPEBS, Postretirement benefits other than pensions
- §40. Working capital and current assets
- §41. Expenses generally
- §42. Accounting Authority Orders
- §43. Financial Accounting Standards Board requirements

ACCOUNTING
I. IN GENERAL**§4. Jurisdiction and powers of the State Commission**

The Commission found that Sections 393.140(4), (8) give the Commission comprehensive control over public utility accounting.--Missouri-American Water Company 13 MPSC 3d 103.

§5. Reports, records and statements

Having found it to be in the public interest, the Commission approved a stipulation and agreement. Pursuant to the Agreement, Kansas City Power & Light Company's nuclear decommissioning trust agreement is changed in order to be consistent with 10 CFR 50.75(h)(1)(iv), promulgated by the Nuclear Regulatory Commission. The change provides for ordinary expenses to be distributed from the decommissioning trust without prior notification.--KCPL 13 MPSC 3d 211.

The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.--The Empire District Electric Company 13 MPSC 3d 331.

II. DUTY TO KEEP PROPER ACCOUNTS**§7. Duty to keep proper accounts generally**

Sendero, DTE, and the Staff entered into a stipulation that would allow Sendero to buy DTE's interest in Southern Missouri Gas Company. Part of that stipulation was that Sendero would keep data related to affiliate transactions and corporate allocation of costs between its regulated and non-regulated operations.--DTE Enterprises and DTE Ozark 13 MPSC 3d 456.

§9. Methods of accounting generally

Commission Rule 4 CSR 240-50.030(1) requires water corporations to use the Uniform System of Accounts (USOA) issued by the National Association of Regulatory Utility Commissioners (NARUC). The USOA is an accounting system meant to accurately report a business' operation during a specific time.--Missouri-American Water Company 13 MPSC 3d 103.

III. PARTICULAR ITEMS

§17. Depreciation reserve account

In the Commission's January 11, 2005, Third Report and Order, it finds that the goal of depreciation accounting is to calculate the amount the customer pays, proportionate to the benefit the utility customer receives, to cover the full cost of an asset from which they receive service.--Laclede Gas Company 13 MPSC 3d 215.

§42. Accounting Authority Orders

The Commission summarily denied Aquila, Inc.'s request for an Accounting Authority Order concerning rising fuel costs because such costs were addressed in a Stipulation and Agreement previously entered into by Aquila.--Aquila, Inc. 13 MPSC 3d 54.

An AAO is a Commission-allowed departure from the USOA that allows deferral of costs from one period to another. The Commission's guidepost in determining whether to grant an AAO is whether the event associated with the costs is extraordinary. The USOA defines extraordinary items as items that are not typical or customary.--Missouri-American Water Company 13 MPSC 3d 103.

CERTIFICATES

I. IN GENERAL

- §1. Generally**
- §2. Unauthorized operations and construction**
- §3. Obligation of the utility**

II. JURISDICTION AND POWERS

- §4. Jurisdiction and powers generally**
- §5. Jurisdiction and powers of Federal Commissions**
- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of local authorities**
- §8. Jurisdiction and powers over interstate operations**

- §9. Jurisdiction and powers over operations in municipalities
- §10. Jurisdiction and powers over the organizations existing prior to the Public Service Commission law

III. WHEN A CERTIFICATE IS REQUIRED

- §11. When a certificate is required generally
- §12. Certificate from federal commissions
- §13. Extension and changes
- §14. Incidental services or operations
- §15. Municipal limits
- §16. Use of streets or public places
- §17. Resumption after service discontinuance
- §18. Substitution or replacement of facilities
- §19. Effect of general laws, franchises and licenses
- §20. Certificate as a matter of right

IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS

- §21. Grant or refusal of certificate generally
- §21.1. Public interest
- §21.2. Technical qualifications of applicant
- §21.3. Financial ability of applicant
- §21.4. Economic feasibility of proposed service
- §22. Restrictions and conditions
- §23. Who may possess
- §24. Validity of certificate
- §25. Ability and prospects of success
- §26. Public safety
- §27. Charters and franchises
- §28. Contracts
- §29. Unauthorized operation or construction
- §30. Municipal or county action
- §31. Rate proposals
- §32. Competition or injury to competitor
- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
- §35. Existing service and facilities

V. PREFERENCE BETWEEN RIVAL APPLICANTS - FACTORS

- §36. Preference between rival applicants generally
- §37. Ability and responsibility
- §38. Existing or past service
- §39. Priority of applications
- §40. Priority in occupying territory
- §41. Rate proposals

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
- §46. Telecommunications
- §46.1. Certificate of local exchange service authority
- §46.2. Certificate of interexchange service authority
- §46.3. Certificate of basic local exchange service authority
- §47. Sewers

VII. OPERATION UNDER TERMS OF THE CERTIFICATE

- §48. Operations under terms of the certificate generally
- §49. Beginning operation
- §50. Duration of certificate right
- §51. Modification and amendment of certificate generally

VIII. TRANSFER, MORTGAGE OR LEASE

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
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- §55. Transferability of rights
- §55.1. Change of supplier
- §55.2. Territorial agreement
- §56. Partial transfer
- §57. Transfer of abandoned or forfeited rights
- §58. Mortgage of certificate rights
- §59. Sale of certificate rights

IX. REVOCATION, CANCELLATION AND FORFEITURE

- §60. Revocation, cancellation and forfeiture generally
- §61. Acts or omissions justifying revocation or forfeiture
- §62. Necessity of action by the Commission
- §63. Penalties

CERTIFICATES

I. IN GENERAL

§1. Generally

The Commission established this case to investigate the sale or distribution of gas and electric energy by companies not certificated by the

Commission. In the Order Closing Case, the Commission determined that there were no noncertificated entities selling energy in Missouri.-- Investigation into sale of natural gas & electricity 13 MPSC 3d 478.

III. WHEN A CERTIFICATE IS REQUIRED

§11. When a certificate is required generally

A certificate of convenience and necessity is required only when an electric corporation starts business, or it attempts to serve a new area. That corporation does not need a certificate to build plant in its existing service area.--Aquila, Inc. 13 MPSC 3d 435.

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

§ 46.3. Certificate of basic local exchange service authority

The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide basic local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier. -- ALLTEL Missouri, Inc. 13 MPSC 3d 2.

The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.--BPS Telephone 13 MPSC 3d 92.

DEPRECIATION

I. IN GENERAL

- §1. Generally**
- §2. Right to allowance for depreciation**
- §3. Reports, records and statements**
- §4. Obligation of the utility**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the State Commission**

- §7. Jurisdiction and powers of the Federal Commission
- §8. Jurisdiction and powers of local authorities

III. BASIS FOR CALCULATION

- §9. Generally
- §10. Cost or value
- §11. Property subject to depreciation
- §12. Methods of calculation
- §13. Depreciation rates to be allowed
- §14. Rates or charges for service

IV. FACTORS AFFECTING ANNUAL ALLOWANCE

- §15. Factors affecting annual allowance generally
- §16. Life of enterprise
- §17. Life of property
- §18. Past depreciation
- §19. Charges to maintenance and other accounts
- §20. Particular methods and theories
- §21. Experience
- §22. Life of property and salvage
- §23. Sinking fund and straight line
- §24. Combination of methods

V. RESERVES

- §25. Necessity
- §26. Separation between plant units
- §27. Amount
- §28. Ownership of fund
- §29. Investment and use
- §30. Earnings on reserve

VI. DEPRECIATION OF PARTICULAR UTILITIES

- §31. Electric and power
 - §32. Gas
 - §33. Heating
 - §34. Telecommunications
 - §35. Water
-

DEPRECIATION**III. BASIS FOR CALCULATION****§10. Cost or value**

The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to calculate the net salvage value. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.--Laclede Gas Company 13 MPSC 3d 215.

§13. Depreciation rates to be allowed

The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to calculate the net salvage value. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.--Laclede Gas Company 13 MPSC 3d 215.

IV. FACTORS AFFECTING ANNUAL ALLOWANCE**§22. Life of property and salvage**

The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to calculate the net salvage value. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.--Laclede Gas Company 13 MPSC 3d 215.

VI. DEPRECIATION OF PARTICULAR UTILITIES**§32. Gas**

The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support changing the accrual method. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.--Laclede Gas Company 13 MPSC 3d 215.

DISCRIMINATION**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Recovery of damages for discrimination
- §4. Recovery of discriminatory undercharge
- §5. Reports, records and statements

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the local authorities

III. RATES

- §9. Competitor's right to equal treatment
- §10. Free service
- §11. Inequality of rates
- §12. Methods of eliminating discrimination
- §13. Optional rates
- §14. Rebates
- §15. Service charge, meter rental or minimum charge
- §16. Special rates
- §17. Rates between localities
- §18. Concessions

IV. RATES BETWEEN CLASSES

- §19. Bases for classification and differences
- §20. Right of the utility to classify
- §21. Reasonableness of classification

V. RATES AND CHARGES OF PARTICULAR UTILITIES

- §22. Electric and power
- §23. Gas
- §24. Heating
- §25. Telecommunications
- §26. Sewer
- §27. Water

VI. SERVICE IN GENERAL

- §28. Service generally

- §29. Abandonment and discontinuance
- §30. Discrimination against competitor
- §31. Equipment, meters and instruments
- §32. Extensions
- §33. Preference during shortage of supply
- §34. Preferences to particular classes or persons

VII. SERVICE BY PARTICULAR UTILITIES

- §35. Electric and power
- §36. Gas
- §37. Heating
- §38. Sewer
- §39. Telecommunications
- §40. Water

DISCRIMINATION

No headnotes in this volume involved the question of discrimination.

ELECTRIC

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

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- §13. Operations generally
- §14. Rules and regulations

- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
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- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
 - §47. Physical connection
 - §48. Contracts
 - §48.1 Qualifying facilities
 - §49. Records and statements
-

ELECTRIC**I. INGENERAL****§ 1. Generally**

The Commission opened an investigative case in which interested parties discussed Kansas City Power and Light Company's resource needs and plans. Once the general discussion shifted to settlement discussions, the Commission closed the case as no Commission action was anticipated. The Commission noted that if the company develops a regulatory plan for which it wants the Commission's approval, it can request that approval in a new case.--KCPL 13 MPSC 3d 326.

The Commission established this case to investigate the sale or distribution of gas and electric energy by companies not certificated by the Commission. In the Order Closing Case, the Commission determined that there were no noncertificated entities selling energy in Missouri.--Investigation into sale of natural gas & electricity 13 MPSC 3d 478.

On July 28, 2005, the Commission issued its Report and Order approving Kansas City Power and Light's Experimental Regulatory Plan which was included in the March 28, 2005 Stipulation and Agreement submitted to the Commission. The Agreement and Report and Order allowed KCPL to amend their agreement to correspond with the agreement filed in Kansas, which was part of the record before the Missouri Commission's hearing. The Commission approved the amendments without further hearing.--KCPL 13 MPSC 3d 608.

§3. Certificate of convenience and necessity

The Commission granted Union Electric Company, doing business as AmerenUE, a Certificate of Convenience and Necessity for an expansion of its service area in New Madrid County.--Union Electric Company / Noranda Aluminium 13 MPSC 3d 405.

An electric corporation does not need a certificate to build plant in its existing service area. The certificate allows the corporation to exercise the powers it already has, including building plant.--Aquila, Inc. 13 MPSC 3d 435.

§4. Transfer, lease and sale

Subject to certain conditions, the Commission authorized Union Electric Company, doing business as AmerenUE to transfer its electric and natural gas retail operations in Illinois, including associated system assets, to AmerenCIPS, including normal additions and retirements since December 31, 2003.--Union Electric Company 13 MPSC 3d 16.

Having found it to be not detrimental to the public interest, the Commission approved the transfer of operations and facilities from Union Electric Company to Central Illinois Public Service Company.--Union Electric Company 13 MPSC 3d 266.

§4.1. Change of suppliers

Having found it to be not detrimental to the public interest, the Commission approved the transfer of operations and facilities from Union Electric Company to Central Illinois Public Service Company.--Union Electric Company 13 MPSC 3d 266.

II. JURISDICTION AND POWERS

§9. Jurisdiction and powers of the State Commission

Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. The Commission will, however, continue to regulate the safety and reliability of Citizens' operations.--Citizens Electric 13 MPSC 3d 62.

GS Technology Operating Company's (GST) complaint was not perfected in accordance with Section 386.390.1, RSMo. In the Commission's Report and Order on Remand, the Commission determined the merits of GST's complaint "upon its own motion" as provided by Section 386.390.1--GST Steel Company v. KCPL 13 MPSC 3d 151.

The Commission is not authorized to award GS Technology Operating Company (GST) or Kansas City Power & Light Company (KCPL) monetary relief or change the companies' special contract. After a hearing, the Commission may set reasonable and just prospective rates; thus the Commission had the authority to determine if GST has been overcharged by KCPL.--GST Steel Company v. KCPL 13 MPSC 3d 151.

The Commission found that it had jurisdiction over the transfer between an electric and gas corporation and regulated electric and gas utility pursuant to Section 393.190.1, RSMo.--Union Electric Company 13 MPSC 3d 266.

The Commission has the jurisdiction to approve or reject a comprehensive experimental regulatory plan. The Public Service Commission Law is to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. The Commission's approval of an experimental regulatory plan is an embodiment of its jurisdiction, not an abandonment of it.--KCPL 13 MPSC 3d 568.

III. OPERATIONS

§13. Operations generally

The Commission approved the transfer of three customers from Union Electric Company d/b/a AmerenUE to the Board of Municipal Utilities of the City of Sikeston.--Union Electric Company 13 MPSC 3d 80.

The Commission established this case to investigate the sale or distribution of gas and electric energy by companies not certificated by the Commission. In the Order Closing Case, the Commission determined that there were no noncertificated entities selling energy in Missouri.--Investigation into sale of natural gas & electricity 13 MPSC 3d 478.

§14. Rules and regulations

The Commission concluded that because the "Metro East" transfer involved AmerenUE and its parent and affiliates, the Commission's affiliate transaction rules necessarily applied and were waived with regard to the pricing portion, but not with regard to the record-keeping portion.--Union Electric Company 13 MPSC 3d 16.

§15. Cooperatives

Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. Citizens must, however, continue to comply with the relevant provisions of 4 CSR 240-3.190. Citizens must also notify the Commission of fundamental changes in the company's operations.--Citizens Electric 13 MPSC 3d 62.

Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. Citizens must, however, continue to comply with the relevant provisions of 4 CSR 240-3.190. Citizens must also notify the Commission of fundamental changes in the company's operations.--Citizens Electric 13 MPSC 3d 62.

§18. Depreciation

The Commission adopted Empire's position with regard to depreciation and the service lives of mass property accounts, which reduced Empire's Revenue Requirement by \$454,780.

With regard to production property accounts service lives, the Commission rejected the reduced service lives sponsored by Empire in favor of longer lives produced through the use of Iowa Curves as advocated by Staff and Public Counsel.

The Commission adopted Empire's position with regard to Interim Net Salvage of Plant Accounts, resulting in a reduction in annual revenue requirement of \$444,959.

Because the estimates with regard to Terminal Net Salvage of Production Plant Accounts is unduly speculative, the Commission did not allow the accrual of any of the amounts associated therewith.

Because the fundamental goal of depreciation accounting is to allocate the full cost of an asset, including net salvage, over its economic or service life so that utility customers will be charged for the cost of the asset in proportion to the benefit they receive, the Commission's policy is to return to traditional accounting methods for net salvage.--The Empire District Electric Company 13 MPSC 3d 350.

§20. Rates

The Commission is not authorized to award GS Technology Operating Company (GST) or Kansas City Power & Light Company (KCPL) monetary relief or change the companies' special contract. After a hearing, the Commission may set reasonable and just prospective rates; thus the Commission had the authority to determine if GST has been overcharged by KCPL.--GST Steel Company v. KCPL 13 MPSC 3d 151.

In the Commission's Report and Order on Remand, the Commission found that GS Technology Operating Company's (GST) charges were appropriately calculated under the special contract negotiated between the parties and approved by the Commission. GST knew of the risks when it agreed to the special contract and failed to prove it was overcharged by Kansas City Power & Light Company.--GST Steel Company v. KCPL 13 MPSC 3d 151.

In determining Empire's revenue requirement, the Commission used the company's actual capital structure, rather than a hypothetical capital structure, which is appropriate only in certain unusual circumstances.--The Empire District Electric Company 13 MPSC 3d 350.

The Commission concluded that the proposed Large Transmission Service tariff should be approved, on an interim basis, for service rendered to Noranda Aluminum, Inc., on and after June 1, 2005, but only until such time as the Commission issues its final order in the next case to consider UE's rates.--Union Electric Company / Noranda Aluminum 13 MPSC 3d 405.

The Commission found that the experimental regulatory plan provides a framework that should lead to reasonable rates during the expected five-year duration of the construction. The method the signatory parties used to get to those expected reasonable rates is additional amortization. The additional amortization should result in lower capitalized costs

during construction, and therefore will result in a lower future rate base upon which customers must pay a return on.--KCPL 13 MPSC 3d 568.

The Commission found that the experimental regulatory plan provides a framework that should lead to reasonable rates during the expected five-year duration of the construction. The method the signatory parties used to get to those expected reasonable rates is additional amortization. The additional amortization should result in lower capitalized costs during construction, and therefore will result in a lower future rate base upon which customers must pay a return on. --The Empire District Electric Company 13 MPSC 3d 596.

§24. Services generally

In the Commission's Report and Order on Remand, the Commission found the performance of Kansas City Power & Light Company's (KCPL) system to be acceptable at the time in question; however, GS Technology Operating Company had noticed a declining trend in KCPL's performance.--GST Steel Company v. KCPL 13 MPSC 3d 151.

The Commission approved a Stipulation and Agreement, allowing Union Electric Company, doing business as AmerenUE, to extend its service area in order to supply power to Noranda Aluminum, Inc.--Union Electric Company / Noranda Aluminium 13 MPSC 3d 405.

§27. Accounting

Having found it to be in the public interest, the Commission approved a stipulation and agreement. Pursuant to the Agreement, Kansas City Power & Light Company's nuclear decommissioning trust agreement is changed in order to be consistent with 10 CFR 50.75(h)(1)(iv), promulgated by the Nuclear Regulatory Commission. The change provides for ordinary expenses to be distributed from the decommissioning trust without prior notification.--KCPL 13 MOPSC 3d 211.

§29. Rate of return

The Commission used a risk-based, comparative analysis, as required by *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679 and *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, in determining that Empire Cost of Common Equity should be 11.0%.--The Empire District Electric Company 13 MPSC 3d 350.

§30. Construction

An electric corporation may construct plant in its service territory without getting a site-specific certificate. The certificate allows the corporation to exercise the powers it already has, including building plant.--Aquila, Inc. 13 MPSC 3d 435.

The Commission found that the experimental regulatory plan should include the construction of a coal-fired baseload plant. The plant would be the lowest cost option to adequately and safely serve the projected need for additional baseload capacity. Wind generation alone, energy efficiency alone, or a combination of both, will not meet the customers' needs for additional baseload capacity. Also, integrated gasification combined cycle technology is not advanced enough to allow construction of a baseload plant of the size that needs to be built.--KCPL 13 MPSC 3d 568.

The Commission found that the experimental regulatory plan should include the construction of a coal-fired baseload plant. The plant would be the lowest cost option to adequately and safely serve the projected need for additional baseload capacity.--The Empire District Electric Company 13 MPSC 3d 596.

The Commission authorized Aquila to encumber some of its regulated assets to secure low-cost financing to be a partner in the construction of a coal-fired baseload plant. The plant would be a cost-effective option to adequately and safely serve the projected need for additional baseload capacity.--Aquila, Inc. 13 MPSC 3d 602.

§32. Safety

In the Report and Order on Remand, the Commission found GS Technology Operating Company (GST) failed to show, by competent and substantial evidence, the explosion resulted from imprudence on the part of Kansas City Power & Light Company.--GST Steel Company v. KCPL 13 MPSC 3d 151.

The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.--The Empire District Electric Company 13 MPSC 3d 331.

§33. Maintenance

The Commission ordered that AmerenUE must report its tree-trimming progress to the Commission.--Union Electric Company 13 MPSC 3d 420.

§34. Additions and betterments

The experimental plan that the Commission approved included investments for accelerated compliance with environmental regulations. The investments are for equipment that is to reduce site emissions of sulfur dioxide, nitrogen oxide, stack particulate matter and mercury. Also, the

investments are for a selective catalytic reduction facility and wind generation facilities.--KCPL 13 MPSC 3d 568.

The experimental plan that the Commission approved included investments for accelerated compliance with environmental regulations. The investments are for equipment that is to reduce site emissions of sulfur dioxide. Also, the investments are for a selective catalytic reduction facility and a gas-fired peaking plant.--The Empire District Electric Company 13 MPSC 3d 596.

§39. Costs and expenses

AmerenUE will increase its annual tree-trimming budget from \$23.5 million to \$30 million.--Union Electric Company 13 MPSC 3d 420.

§40. Reports, records and statements

The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.--The Empire District Electric Company 13 MPSC 3d 331.

§42. Planning and management

The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.--The Empire District Electric Company 13 MPSC 3d 331.

AmerenUE plans to eliminate its tree-trimming backlog by December 31, 2008. Also, to avoid problems it had in the past, AmerenUE will turn off its algorithm system when outage reports in the metro area reach 1,000, or when orders in a region outside the metro area reach 250.--Union Electric Company 13 MPSC 3d 420.

§44. Safety

The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.--The Empire District Electric Company 13 MPSC 3d 331.

§45. Decommissioning costs

The Commission directed that Union Electric Company doing business as AmerenUE make a yearly contribution of \$6,486,378 to the Decommissioning Trust Fund.--Union Electric Company 13 MPSC 3d 16.

Kansas City Power and Light Company filed an application for approval of changes to its nuclear decommissioning trust agreement to make it consistent with the rule promulgated by the Nuclear Regulatory Commission (NRC). This rule, 10 CFR 50.75(h)(1)(iv), provides for administrative costs of operating the decommissioning trust fund to be disbursed without prior notification to the NRC. The Commission approved the application with the conditions found in the parties' Unanimous Stipulation and Agreement.--KCPL 13 MPSC 3d 211.

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

- §1. Generally**
- §2. Jurisdiction and powers**
- §3. Judicial notice; matters outside the record**
- §4. Presumption and burden of proof**
- §5. Admissibility**
- §6. Weight, effect and sufficiency**
- §7. Competency**
- §8. Stipulation**

II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally**
- §10. Admissions**
- §11. Best and secondary evidence**
- §12. Depositions**
- §13. Documentary evidence**
- §14. Evidence by Commission witnesses**
- §15. Opinions and conclusions; evidence by experts**
- §16. Petitions, questionnaires and resolutions**
- §17. Photographs**
- §18. Record and evidence in other proceedings**
- §19. Records and books of utilities**
- §20. Reports by utilities**
- §21. Views**

III. PRACTICE AND PROCEDURE

- §22. Parties**
- §23. Notice and hearing**
- §24. Procedures, evidence and proof**
- §25. Pleadings and exhibits**
- §26. Burden of proof**
- §27. Finality and conclusiveness**
- §28. Arbitration**
- §29. Discovery**
- §30. Settlement procedures**
- §31. Mediator**
- §32. Confidential evidence**
- §33. Defaults**

EVIDENCE, PRACTICE AND PROCEDURE
I. IN GENERAL**§1. Generally**

In the Commission's October 19, 2004 Report and Order, it dismissed part of the Complaint on the basis that the Complainant failed to show evidence that Missouri Gas Energy violated its tariff or Commission rules by disconnecting Complainant's gas service because of the past-due amount owed by Complainant.--Dudley v. MGE 13 MPSC 3d 66.

§2. Jurisdiction and powers

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order closing case because they had no jurisdiction over transactions at the holding company level.--SBC Communications, Inc. 13 MPSC 3d 449.

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.--Verizon Communications, Inc. 13 MPSC 3d 468.

§4. Presumption and burden of proof

In the Commission's Report and Order on Remand, the Commission found that a Complainant who alleges that a regulated utility has acted in an unjust or unreasonable manner has the burden of proof. GS Technology Operating Company failed to meet the burden of proof with

clear and convincing evidence that Kansas City Power & Light Company unreasonably responded to the flooding at the plant.--GST Steel Company v. KCPL 13 MPSC 3d 151.

§6. Weight, effect and sufficiency

In cases brought under Section 393.190.1, the Commission concluded that it would determine whether there was a detriment to the public based on a cost/benefit analysis.--Union Electric Company 13 MPSC 3d 16.

In the Report and Order on Remand, the Commission found GS Technology Operating Company (GST) failed to show, by competent and substantial evidence, the explosion resulted from imprudence on the part of Kansas City Power & Light Company.--GST Steel Company v. KCPL 13 MPSC 3d 151.

The original Missouri 271 Interconnection Agreement (M2A) between Southwestern Bell Telephone L.P., d/b/a SBC Missouri and Missouri CLEC's in Missouri's interLATA long distance market was modeled after a Section 271 proceeding in Texas. The Texas Commission updated versions of the Business Rules following two six-month review periods. SBC Missouri did not agree with all the changes made by the Texas Commission. SBC Missouri's December 2002 revisions included the revisions SBC Missouri agreed with from both updated versions of the Business Rules.

In the Commission's order, the Commission determined that the changes the parties agreed upon shall be included in the M2A. The Commission also determined that the disputed issues do not provide any Missouri-related evidence to determine if the issues are in the public interest and will not be included in the M2A.--SBC Missouri 13 MPSC 3d 170.

§8. Stipulation

The Commission treats a non-unanimous stipulation as if the signatories make a joint recommendation. The Commission still must review the competent and substantial evidence to determine how to rule on the issues.--KCPL 13 MPSC 3d 568.

II. PARTICULAR KINDS OF EVIDENCE

§14. Evidence by Commission witnesses

Staff provided no evidence to support that the recommended change in the accrual method of net salvage was more reasonable than the current depreciation method, which is consistent with the Uniform System of Accounts adopted by the Commission.--Laclede Gas Company 13 MPSC 3d 215.

§15. Opinions and conclusions; evidence by experts

In the Report and Order on Remand, the Commission found GS Technology Operating Company (GST) failed to show, by competent and substantial evidence, the explosion resulted from imprudence on the part of Kansas City Power & Light Company.--GST Steel Company v. KCPL 13 MPSC 3d 151.

III. PRACTICE AND PROCEDURE**§23. Notice and hearing**

The Commission found sufficient support in the existing record to reject, without a hearing, Public Counsel's motion to suspend a telephone company's tariff filing designed to rebalance its basic local and access service rates.--Sprint 13 MPSC 3d 191.

§26. Burden of proof

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC failed to provide the Commission with plans for the use of the federal universal service funds; MMC also failed to provide information detailing how the public would benefit from designating MMC as an eligible telecommunications carrier.--Mid-Missouri Cellular 13 MPSC 3d 130.

In the Commission's Report and Order on Remand, the Commission found that GS Technology Operating Company (GST) failed to show the explosion resulted from imprudence on the part of Kansas City Power & Light Company. A Complainant alleging that a regulated utility has acted in an unjust or unreasonable manner has the burden of proof, which GST failed to meet.--GST Steel Company v. KCPL 13 MPSC 3d 151.

§27. Finality and conclusiveness

In its December 10, 2002 Order, the Commission approved tariffs implementing subsequent annual increases by relying on the finding of fact and conclusions of law of a related case, TR-2002-251. Case Number TR-2002-251 was remanded for additional finding of fact and conclusions of law, therefore, the December 10, 2002 order for IT-2003-0166 was also remanded to the Commission. In its March 3, 2005 Order on Remand, the Commission adopted the findings of fact and conclusions of law issued in the Order on Remand in TR-2002-251.--Sprint Missouri, Inc. 13 MPSC 3d 341.

§30. Settlement procedures

In an uncontested/investigative case in which no Commission action was anticipated, the Commission closed the case once the general discussion between participants shifted to settlement discussions.-- KCPL 13 MPSC 3d 326.

§33. Defaults

Martin Homes, Inc., d/b/a Martin Homes failed to timely file an answer to the complaint filed by the Commission's staff. Rather than respond to the complaint, Martin Homes surrendered its Missouri Modular Unit Manufacturer and Dealer Certificates of Registration. The Commission found Martin Homes in default pursuant to 4 CSR 240-2.070(9) and directed the Public Service Commission Director of the Manufactured Housing and Modular Units Program to bring penalty action against Martin Homes in circuit court.--PSC Director of Manufactured Housing and Modular Units Program 13 MPSC 3d 14.

America's Home Brokers, Inc. (AHB) failed to timely file an answer to the complaint filed by the Commission's staff. The Commission issued an order finding AHB in default. AHB filed a motion to set aside the order granting default because counsel was retained late in the period allowed to file an answer. The Commission found America's Home Brokers, Inc. showed good cause and set aside its order granting default.--PSC Staff v. America's Home Brokers 13 MPSC 3d 90.

EXPENSE**I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Financing practices**
- §4. Apportionment**
- §5. Valuation**
- §6. Accounting**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power**
- §11. Gas**

- §12. Heating
- §13. Telecommunications
- §14. Water
- §15. Sewer

IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses
- §20. Methods of estimating
- §21. Intercorporate costs or dealings

V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments
- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §48. Financing costs and interest

- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense
- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

EXPENSE

VI. PARTICULAR KIND OF EXPENSE

§37. Depreciation

Staff provided no evidence to support that the recommended change in the accrual method of net salvage was more reasonable than the current depreciation method, which is consistent with the Uniform System of Accounts adopted by the Commission.--Laclede Gas Company 13 MPSC 3d 215.

GAS**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Abandonment or discontinuance
- §5. Liability for damages
- §6. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally
- §11. Leakage, shrinkage and waste
- §12. Location
- §13. Additions and betterments
- §14. Extensions
- §15. Maintenance
- §16. Safety

IV. OPERATION

- §17. Operation generally
- §17.1. Purchased Gas Adjustment (PGA)
- §17.2. Purchased Gas-incentive mechanism
- §18. Rates
- §19. Revenue
- §20. Return
- §21. Service
- §22. Weatherization
- §23. Valuation
- §24. Accounting
- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices

- §34. Accounting Authority orders
- §35. Safety

V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation
- §41. Pipelines

VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Depreciation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business
- §62. Expenses relating to unused property
- §63. Expenses of rate proceedings
- §64. Extensions
- §65. Financing costs and interest
- §66. Franchise and license expense
- §67. Insurance and surety premiums
- §68. Legal expense
- §69. Loss from unprofitable business
- §70. Losses in distribution
- §71. Maintenance and depreciation; repairs and replacements
- §72. Management, administration and financing fees
- §73. Materials and supplies

- §74. Purchases under contract
- §75. Office expense
- §76. Officers' expenses
- §77. Political and lobbying expenditures
- §78. Payments to affiliated interests
- §79. Rentals
- §80. Research
- §81. Salaries and wages
- §82. Savings in operation
- §83. Securities redemption or amortization
- §84. Taxes
- §85. Uncollectible accounts
- §86. Administrative expense
- §87. Engineering and superintendence expense
- §88. Interest expense
- §89. Preliminary and organization expense
- §90. Expenses incurred in acquisition of property
- §91. Demand charges
- §92. Expenses incidental to refunds for overcharges

GAS

I. IN GENERAL

§1. Generally

The Commission found that Missouri Gas Energy did not violate the notice requirement of its tariff or the Commission's rules when it disconnected the Complainant's service in July 2002.--Dudley v. MGE 13 MPSC 3d 66.

The Commission also found that Missouri Gas Energy discontinued service based on Complainant's failure to pay the past-due debt for service received at his residence, which did not violate Section 8.08 of the Company's tariff.--Dudley v. MGE 13 MPSC 3d 66.

The Commission directed Laclede Gas Company to continue the requirements of the previously approved stipulation and agreement, with annual reporting from Staff to the Commission.--Laclede Gas 13 MPSC 3d 84.

The Commission established this case to investigate the sale or distribution of gas and electric energy by companies not certificated by the Commission. In the Order Closing Case, the Commission determined that there were no noncertificated entities selling energy in Missouri.--Investigation into sale of natural gas & electricity 13 MPSC 3d 478.

§6. Transfer, lease and sale

Missouri Gas Utility, Inc. (MGU), filed an application requesting that the Missouri Public Service Commission approve its application for a certificate of convenience and necessity; approve MGU's acquisition of the Gallatin and Hamilton, Missouri, natural gas system assets; grant MGU the authority to encumber those assets in connection with the acquisition; and authorize MGU to file tariffs to establish rates, rules, and regulations. The Commission approved a stipulation and agreement that authorized the transfer and resolved all issues between the parties.--Missouri Gas Utility, Inc. 13 MPSC 3d 183.

Having found it to be not detrimental to the public interest, the Commission approved the transfer of operations and facilities from Union Electric Company to Central Illinois Public Service Company.--Union Electric Company 13 MPSC 3d 266.

II. JURISDICTION AND POWERS**§7. Jurisdiction and powers of the State Commission**

The Commission found that it had jurisdiction over the transfer between an electric and gas corporation and regulated electric and gas utility pursuant to Section 393.190.1, RSMo.--Union Electric Company 13 MPSC 3d 266.

III. CONSTRUCTION AND EQUIPMENT**§11. Leakage, shrinkage and waste**

The Commission directed Laclede Gas Company to continue to conduct an annual bar-hole leak survey of direct-buried copper service lines.--Laclede Gas 13 MPSC 3d 84.

IV. OPERATION**§17. Operation generally**

The Commission established this case to investigate the sale or distribution of gas and electric energy by companies not certificated by the Commission. In the Order Closing Case, the Commission determined that there were no noncertificated entities selling energy in Missouri.--Investigation into sale of natural gas & electricity 13 MPSC 3d 478.

§18. Rates

In the judgment of the Commission, the company and the Office of the Public Counsel failed to establish sufficient reason to rehear the Commission's decision regarding the company's request for a rate increase.--Missouri Gas Energy 13 MPSC 3d 59.

As part of the parties' stipulation, Sendero agreed to comply with DTE's and Southern Missouri Gas Company's commitments regarding ACA recommendations, and ACA over/under recovery balance.--DTE Enterprises and DTE Ozark 13 MPSC 3d 456.

§19. Revenue

Following explicit direction from the Missouri Court of Appeals following an appeal, the Commission reversed its previous order and allowed Laclede Gas Company to retain \$4,872,997 in proceeds from its Price Stabilization Program account for the winter of 2000-2001.--Laclede Gas Company 13 MPSC 3d 424.

§27. Depreciation

The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support changing the accrual method. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.--Laclede Gas Company 13 MPSC 3d 215.

§30. Reports, records and statements

As part of the parties' stipulation, Southern Missouri Gas Company shall keep its books so that its plant in service balances can be segregated between amounts Southern Missouri Gas Company invested prior to closing, and the net original cost that Southern Missouri Gas Company claims may be invested following the closing date.--DTE Enterprises and DTE Ozark 13 MPSC 3d 456.

§33. Billing practices

Missouri Gas Energy (MGE) applied a tenant's past-due debt to Complainant's account at his residence, alleging that the debt was transferable because Complainant benefited from the gas service because his property was heated during the time period in question and was thus protected from cold temperatures. The Commission determined that company's tariff does not permit MGE to hold Complainant liable to the past-due debt of his tenant. The Commission ordered MGE to remove the tenant's past-due from Complainant's account, along with all associated late fees.--Dudley v. MGE 13 MPSC 3d 66.

§35. Safety

The Commission directed Laclede Gas Company to continue to conduct an annual bar-hole leak survey of direct-buried copper service lines.

The Commission also directed that the requirements in the previously approved stipulation and agreement, which call for Class 3 leaks in Pressure Region I to be repaired within six months and Class 3 leaks in Pressure Region II to be repaired within one year, be continued.

Finally, the Commission directed that the annual requirement of 8,000 direct-buried copper service line replacements be maintained by Laclede Gas Company.--Laclede Gas 13 MPSC 3d 84.

This order closes the gas safety case involving West Central Energy. WCE has responded to the natural gas safety problems effectively and has taken the appropriate steps to minimize the risk of ice accumulating on vital service regulators. Therefore, Commission closes this case.--Investigation of West Central Energy 13 MPSC 3d 606.

V. JOINT OPERATIONS

§40. Transportation

The Commission approved a tariff that will make AmerenUE transportation customers, served by Panhandle Eastern Pipe Line Company, subject to the same Commission-approved tariffs that apply to other AmerenUE transportation customers.--Union Electric Company 13 MPSC 3d 77.

VI. PARTICULAR KIND OF EXPENSES

§54. Depreciation

The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support changing the accrual method. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.--Laclede Gas Company 13 MPSC 3d 215.

MANUFACTURED HOUSING

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

II. WHEN A PERMIT IS REQUIRED

- §6. When a permit is required generally**
- §7. Operations and construction**

III. GRANT OR REFUSAL OF A PERMIT

- §8. Grant or refusal generally**
- §9. Restrictions or conditions**
- §10. Who may possess**
- §11. Public safety**

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §12. Operations under the permit generally**
- §13. Duration of the permit**
- §14. Modification and amendment of the permit generally**
- §15. Transfer, mortgage or lease generally**
- §16. Revocation, cancellation and forfeiture generally**
- §17. Acts or omissions justifying revocation or forfeiture**
- §18. Necessity of action by the Commission**
- §19. Penalties**

MANUFACTURED HOUSING
I. IN GENERAL**§1. Generally**

Martin Homes, Inc., d/b/a Martin Homes failed to timely file an answer to the complaint filed by the Commission's staff. Staff had alleged that Martin Homes had violated various code provisions and had failed to correct the deficiencies in a reasonable period of time. Rather than respond to the complaint, Martin Homes surrendered its Missouri Modular Unit Manufacturer and Dealer Certificates of Registration. The Commission found Martin Homes in default pursuant to 4 CSR 240-2.070(9) and directed the Public Service Commission Director of the Manufactured Housing and Modular Units Program to bring penalty action against Martin Homes in circuit court.--PSC Director of Manufactured Housing and Modular Units Program 13 MPSC 3d 14.

America's Home Brokers, Inc. (AHB) failed to timely file an answer to the complaint filed by the Commission's staff. The Commission issued an order finding AHB in default. AHB filed a motion to set aside the order granting default because counsel was retained late in the period allowed to file an answer. The Commission found America's Home Brokers, Inc. showed good cause and set aside its order granting default.--PSC Director of Manufactured Housing and Modular Units Program v. America's Home Brokers 13 MPSC 3d 90.

§2. Obligation of the manufacturers and dealers

The Director of Manufactured Housing and Modular Units Program of the MPSC filed a complaint against America's Home Brokers, Inc claiming that they did not receive valid waivers of setup responsibilities as part of purchase agreements with customers and they found deficiencies in four homes and failed to correct those. The parties filed an agreement that the Director would dismiss the complaint if 1) America's Home pays a \$1000 penalty and fixes all of the deficiencies noted by a set date. This agreement was approved because both parties agreed to the terms.--PSC Director of Manufactured Housing and Modular Units Program v. America's Home Brokers, Inc. 13 MPSC 3d 566.

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION**§17. Acts or omissions justifying revocation or forfeiture**

Improper set-up and alteration of a manufactured home could result in the Commission revoking a dealer's registration. Because, however, the dealer compensated the buyers for their damage, the Commission ordered the dealer on probation for two years.--Public Service Commission Director of Manufactured Housing and Modular Units v. Amega Sales, Inc. 13 MPSC 3d 474.

PUBLIC UTILITIES
I. IN GENERAL

- §1. Generally**
- §2. Nature of**
- §3. Functions and powers**
- §4. Termination of status**
- §5. Obligation of the utility**

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally**
- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

- §10. Tests in general**
- §11. Franchises**
- §12. Charters**
- §13. Acquisition of public utility property**
- §14. Compensation or profit**
- §15. Eminent domain**
- §16. Property sold or leased to a public utility**

- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

- §23. Particular organizations generally
- §24. Municipal plants
- §25. Municipal districts
- §26. Mutual companies; cooperatives
- §27. Corporations
- §28. Foreign corporations or companies
- §29. Unincorporated companies
- §30. State or federally owned or operated utility
- §31. Trustees

PUBLIC UTILITIES

I. IN GENERAL

§1. Generally

The Commission determined that the case has accomplished its goal of obtaining information from utility companies in Missouri regarding their emergency preparedness. Therefore, the Commission closed the case.--Investigation into Public Utility Emergency Preparedness 13 MPSC 3d 330.

The Commission assessed a total of \$13,777,864 to public utilities in proportion to their respective gross intrastate operating revenues during the proceeding calendar year.--Assessment FY 2006 13 MPSC 3d 510.

§2. Nature of

A company distributing chilled brine for the purpose of operating chillers to provide air conditioning is not a public utility subject to regulation by the Commission where it does not offer its services to the public, but instead sell its service to selected customers under individual, long-term contracts.--Trigen-Kansas City Energy Corp. 13 MPSC 186.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order closing case because they had no jurisdiction over transactions at the holding company level.--SBC Communications, Inc. 13 MPSC 3d 449.

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.--Verizon Communications, Inc. 13 MPSC 3d 468.

Pursuant to The Telecommunications Act of 1996 and the Commission's own rules, the Commission has a duty to review all resale and interconnection agreements to determine if the agreement is in the public interest.--Southwestern Bell Telephone, L.P./Sage Telecom, Inc. 13 MPSC 3d 480.

The Telecommunications Act of 1996 requires interconnection agreements be filed for approval with the State Commission.--Missouri RSA No. 5 Partnership 13 MPSC 3d 488.

IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

§26. Mutual companies; cooperatives

Pursuant to the amendment made to Section 393.110.2, RSMo Supp. 2003, the Commission no longer has authority to regulate Citizens Electric Corporation's rates, financing, accounting or management. Citizens must, however, continue to comply with the relevant provisions of 4 CSR 240-3.190. Citizens must also notify the Commission of fundamental changes in the company's operations.--Citizens Electric 13 MPSC 3d 62.

RATES

I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities

- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercorporate relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders

- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

V. KINDS AND FORMS OF RATES AND CHARGES

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges

- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

VII. EMERGENCY AND TEMPORARY RATES

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

VIII. RATE DESIGN, CLASS COST OF SERVICE

- §118. Method of allocating costs
- §119. Rate design, class cost of service for electric utilities
- §120. Rate design, class cost of service for gas utilities
- §121. Rate design, class cost of service for water utilities
- §122. Rate design, class cost of service for sewer utilities

- §123. Rate design, class cost of service for telecommunications utilities**
§124. Rate design, class cost of service for heating utilities

RATES

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

§23. Efficiency of operation and management

The Commission established this uncontested case directing the Staff of the Commission to investigate all matters pertaining to the financial and operational reliability of Cass County Telephone Company and New Florence Telephone Company. The investigation stemmed from a Federal indictment alleging a shareholder and officer were involved in a telephone cramming scheme involving the companies.--Investigation of Cass County Telephone and New Florence Telephone 13 MPSC 3d 237.

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

§69. Approval or rejection by the Commission

In the judgment of the Commission, the company and the Office of the Public Counsel failed to establish sufficient reason to rehear the Commission's decision regarding the company's request for a rate increase.--Missouri Gas Energy 13 MPSC 3d 59.

V. KINDS AND FORMS OF RATES AND CHARGES

§80. Kinds and forms of rates and charges in general

The Commission approved a Stipulation and Agreement between AT&T Communications of the Southwest and the Staff of the Commission. AT&T erroneously billed customers a \$3.95 monthly recurring charge. The Commission closed the case after AT&T fixed the coding and systems processing errors that caused the monthly charge. In addition, AT&T provided 2,000 AT&T Prepaid Calling Cards to families of the Missouri National Guard reservists.--PSC Staff v. AT&T 13 MPSC 3d 213.

§81. Surcharges

The Commission ruled that telecommunication carriers shall pay assessments of 1.8 percent times the previous month's net jurisdictional revenue, to the Missouri Universal Service Fund administrator on the 22nd day of each month. The requests for reimbursements shall be made no later than the 15th day of each month and reimbursements shall be dispatched no later than the last day of each month. Affected

carriers may recover their assessments through a surcharge. The provisions of 4 CSR 240-31.050(3)(D) are waived for Missouri customers who receive federal Lifeline support.--Investigation - Missouri Universal Service Fund 13 MPSC 3d 417.

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

§110. Telecommunications

Based on the cost studies submitted by a telephone company, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.--Sprint 13 MPSC 3d 191.

Based on the cost studies submitted by Sprint Missouri, Inc. d/b/a Sprint, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.--Sprint Missouri, Inc. 13 MPSC 3d 341.

SECURITY ISSUES

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Authorization by a corporation**
- §4. Conversion, redemption and purchase by a corporation**
- §5. Decrease of capitalization**
- §6. Sinking funds**
- §7. Dividends**
- §8. Revocation and suspension of Commission authorization**
- §9. Fees and expenses**
- §10. Purchase by utility**
- §11. Accounting practices**

II. JURISDICTION AND POWERS

- §12. Jurisdiction and powers in general**
- §13. Jurisdiction and powers of Federal Commissions**
- §14. Jurisdiction and powers of the State Commission**
- §15. Jurisdiction and powers of local authorities**

III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

- §16. Necessity of authorization by the Commission generally
- §17. Installment contracts
- §18. Refunding or exchange of securities
- §19. Securities covering utility and nonutility property
- §20. Securities covering properties outside the State

IV. FACTORS AFFECTING AUTHORIZATION

- §21. Factors affecting authorization generally
- §21.1. Effect on bond rating
- §22. Equity capital
- §23. Charters
- §24. Competition
- §25. Compliance with the terms of a mortgage or lease
- §26. Definite plans and purposes
- §27. Financial conditions and prospects
- §28. Use of proceeds
- §29. Dividends and dividend restrictions
- §30. Improper practices and irregularities
- §31. Intercorporate relations
- §32. Necessity of issuance
- §33. Revenue
- §34. Rates and rate base
- §35. Size of the company
- §36. Title of property
- §37. Amount
- §38. Kind of security
- §39. Restrictions imposed by the security

V. PURPOSES AND SUBJECTS OF CAPITALIZATION

- §40. Purposes and subjects of capitalization generally
- §41. Additions and betterments
- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead

- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
- §55. Renewals, replacements and reconstruction
- §56. Working capital

VI. KINDS AND PROPORTIONS

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

VII. SALE PRICE AND INTEREST RATES

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

VIII. FINANCING METHODS AND PRACTICES

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
- §74. Subscriptions and allotments
- §75. Stipulation as to rate base

IX. PARTICULAR UTILITIES

- §76. Telecommunications
 - §77. Electric and power
 - §78. Gas
 - §79. Sewer
 - §80. Water
 - §81. Miscellaneous
-

SECURITY ISSUES

No headnotes in this volume involved the question of security issues.

SERVICE

I. IN GENERAL

- §1. Generally
- §2. What constitutes adequate service
- §3. Obligation of the utility
- §4. Abandonment, discontinuance and refusal of service
- §5. Contract, charter, franchise and ordinance provisions
- §6. Restoration or continuation of service
- §7. Substitution of service
- §7.1. Change of supplier
- §8. Discrimination

II. JURISDICTION AND POWERS

- §9. Jurisdiction and powers generally
- §10. Jurisdiction and powers of the Federal Commissions
- §11. Jurisdiction and powers of the State Commission
- §12. Jurisdiction and powers over service outside of the state
- §13. Jurisdiction and powers of the courts
- §14. Jurisdiction and powers of local authorities
- §15. Limitations on jurisdiction
- §16. Enforcement of duty to serve

III. DUTY TO SERVE

- §17. Duty to serve in general
- §18. Duty to render adequate service
- §19. Extent of profession of service
- §20. Duty to serve as affected by contract
- §21. Duty to serve as affected by charter, franchise or ordinance
- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
- §24. Duty to serve as affected by inadequate revenue

IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities

SERVICE

- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

V. SERVICE BY PARTICULAR UTILITIES

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

SERVICE

I. IN GENERAL

§2. What constitutes adequate service

The evidence presented at an expedited hearing showed that while the reliability of the steam service offered by the utility would be slightly reduced by the conversion from a looped system to separate radial lines, there was no indication that its services would be rendered unsafe, unreliable, or inadequate, such as to justify an emergency order that would disrupt a major civic construction project.--Jackson County v. Trigen-KC Energy & Thermal North America 13 MPSC 3d 425.

§4. Abandonment, discontinuance and refusal of service

Section 386.310.1 RSMo gives the Commission authority to order a utility to take appropriate and necessary actions to maintain the safety

and reliability of its distribution system.--Jackson County v. Trigen-KC Energy & Thermal North America 13 MPSC 3d 425.

The evidence presented at an expedited hearing showed that while the reliability of the steam service offered by the utility would be slightly reduced by the conversion from a looped system to separate radial lines, there was no indication that its services would be rendered unsafe, unreliable, or inadequate, such as to justify an emergency order that would disrupt a major civic construction project.--Jackson County v. Trigen-KC Energy & Thermal North America 13 MPSC 3d 425.

II. JURISDICTION AND POWERS

§11. Jurisdiction and powers of the State Commission

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier (ETC) designation for federal universal service funds. If MMC were granted ETC designation, the Commission would have limited power to ensure compliance with rates and service because MMC is a cellular telecommunications company.--Mid-Missouri Cellular 13 MPSC 3d 130.

§15. Limitations on jurisdiction

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier (ETC) designation for federal universal service funds. If MMC were granted ETC designation, the Commission would have limited power to ensure compliance with rates and service because MMC is a cellular telecommunications company.--Mid-Missouri Cellular 13 MPSC 3d 130.

III. DUTY TO SERVE

§ 18. Duty to render adequate service

An electric corporation has the duty to provide safe and adequate power to the area it serves. The Commission cannot interfere with the corporation's management; the Commission's duty is to determine where the corporation is obligated to serve.--Aquila, Inc. 13 MPSC 3d 435.

As part of the parties' stipulation, Sendero agrees to respond to interruption of service inquiries from the Commission's Consumer Service Department within one business day, and all other inquiries within three business days.--DTE Enterprises and DTE Ozark 13 MPSC 3d 456.

IV. OPERATIONS

§29. Service area

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC did not provide the Commission with specific plans of use of the universal service funds, therefore, the Commission could not determine if MMC would be providing additional services compared to the current plans provided.--Mid-Missouri Cellular 13 MPSC 3d 130.

§ 31. Rules and regulations

The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide basic local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.--ALLTEL Missouri, Inc. 13 MPSC 3d 2.

The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.--BPS Telephone 13 MPSC 3d 92.

V. SERVICE BY PARTICULAR UTILITIES

§45. Telecommunications

The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.--BPS Telephone 13 MPSC 3d 92.

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

§49. Restriction and control of connections, instruments and equipment

The Commission found the stipulation and agreement, which allowed The Empire District Electric Company to manage its sulfur dioxide emissions allowance inventory according to specific accounting guidelines, was reasonable and should be approved. The Commission directed Empire to submit annual reports to Staff and Public Counsel.--The Empire District Electric Company 13 MPSC 3d 331.

SEWER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

III. OPERATIONS

- §10. Operation generally
- §11. Construction and equipment
- §12. Maintenance
- §13. Additions and betterments
- §14. Rates and revenues
- §15. Return
- §16. Costs and expenses
- §17. Service
- §18. Depreciation
- §19. Discrimination
- §20. Apportionment
- §21. Accounting
- §22. Valuation
- §23. Extensions
- §24. Abandonment or discontinuance
- §25. Reports, records and statements
- §26. Financing practices
- §27. Security issues
- §28. Rules and regulations

- §29. Billing practices
- §30. Eminent domain
- §31. Accounting Authority orders

SEWER

I. INGENERAL

§4. Transfer, lease and sale

The Commission rejected, without a hearing, an application that would have conveyed all of a company's water assets, and some, but not all, of its sewer assets to another utility company, where the distressed selling company, which was already providing poor service to its customers, would have been left to operate a remnant portion of its sewer system.--Missouri-American Water Company 13 MPSC 3d 499.

STEAM

I. INGENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

III. OPERATIONS

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation

- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

STEAM

I. IN GENERAL

§4. Transfer, lease and sale

The Commission approved a stipulation and agreement regarding the sale of all the stock of a steam heating company to a new holding company.--Trigen-Kansas City Energy Group 13 MPSC 3d 186.

II. JURISDICTION AND POWER

§9. Jurisdiction and powers of the State Commission

A company distributing chilled brine for the purpose of operating chillers to provide air conditioning meets the statutory definition of a heating company and is, therefore, subject to regulation by the Commission.--Trigen-Kansas City Energy Group 13 MPSC 3d 186.

A company distributing chilled brine for the purpose of operating chillers to provide air conditioning is not a public utility subject to regulation by the Commission where it does not offer its services to the public, but instead sell its service to selected customers under individual, long-term contracts.--Trigen-Kansas City Energy Group 13 MPSC 3d 186.

§12. Unregulated service agreements

A company distributing chilled brine for the purpose of operating chillers to provide air conditioning is not a public utility subject to regulation by the Commission where it does not offer its services to the public, but instead sell its service to selected customers under individual, long-term contracts.--Trigen-Kansas City Energy Group 13 MPSC 3d 186.

III. OPERATIONS

§24. Services generally

Section 386.310.1 RSMo gives the Commission authority to order a utility to take appropriate and necessary actions to maintain the safety and reliability of its distribution system.--Jackson County v. Trigen-KC Energy & Thermal North America 13 MPSC 3d 425.

The evidence presented at an expedited hearing showed that while the reliability of the steam service offered by the utility would be slightly reduced by the conversion from a looped system to separate radial lines, there was no indication that its services would be rendered unsafe, unreliable, or inadequate, such as to justify an emergency order that would disrupt a major civic construction project.--Jackson County v. Trigen-KC Energy & Thermal North America 13 MPSC 3d 425.

TELECOMMUNICATIONS

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority

- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

III. OPERATIONS

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §14.1. Universal Service Fund
- §15. Establishment of a rate base
- §16. Revenue
- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
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- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection

- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally, or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated
- §47. Price Cap

TELECOMMUNICATIONS

I. IN GENERAL

§1. Generally

The Commission found that ALLTEL's election to become a price-cap regulated carrier invalid under Section 392.245, RSMo 2000.--ALLTEL Missouri, Inc. 13 MPSC 3d 2.

The Commission granted a motion to dismiss the case given the imminent expiration of the M2A, the *de minimis* volumes of HFPL (high frequency portion of the loop) traffic under the current M2A, and the fact that the bulk of the orders for HFPL were issued under non M2A agreements.--Southwestern Bell Telephone, L.P., 13 MPSC 3d 327.

The Office of the Public Counsel filed a motion requesting that the Commission "provide for expanded local calling scopes in the rural areas of Missouri" and that the Commission establish a procedure for the creation of these plans. The Commission instead determined that this case could be closed because the Commission is in the process of implementing an administrative rule, in Case No. TX-2005-0194, that will address the concerns raised by the Office of the Public Counsel.--Investigation - Expanded Local Area Calling 13 MPSC 3d 411.

§2. Obligation of the utility

The Commission ruled that telecommunication carriers shall pay assessments of 1.8 percent times the previous month's net jurisdictional revenue, to the Missouri Universal Service Fund administrator on the 22nd day of each month. The requests for reimbursements shall be made no later than the 15th day of each month and reimbursements

shall be dispatched no later than the last day of each month. Affected carriers may recover their assessments through a surcharge. The provisions of 4 CSR 240-31.050(3)(D) are waived for Missouri customers who receive federal Lifeline support.--Investigation - Missouri Universal Service Fund 13 MPSC 3d 417.

§3.3. Certificate of basic local exchange service authority

The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.--BPS Telephone 13 MPSC 3d 92.

§4. Transfer, lease and sale

The Commission determined that it does not have jurisdiction to review a sale of the stock of a Missouri telephone company from one out-of-state holding company to another out-of-state holding company.--SBC Datacomm, Inc. 13 MPSC 3d 328.

The Commission determined that it does not need to approve the conversion of a telephone company from a corporation to a limited liability company.--SBC Datacomm, Inc. 13 MPSC 3d 328.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier (ETC) designation for federal universal service funds. If MMC were granted ETC designation, the Commission would have limited power to ensure compliance with rates and service because MMC is a cellular telecommunications company.--Mid-Missouri Cellular 13 MPSC 3d 130.

Pursuant to 47 U.S.C. §252(e)(2)(A)(ii), the Commission has jurisdiction in determining if the model interconnection agreement and any modifications are in the public interest.--SBC Missouri 13 MPSC 3d 170.

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order

closing case because they had no jurisdiction over transactions at the holding company level.--SBC Communications, Inc. 13 MPSC 3d 449.

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.--Verizon Communications, Inc. 13 MPSC 3d 468.

Pursuant to The Telecommunications Act of 1996 and the Commission's own rules, the Commission has a duty to review all resale and interconnection agreements to determine if the agreement is in the public interest.--Southwestern Bell Telephone, L.P./Sage Telecom, Inc. 13 MPSC 3d 480.

The Telecommunications Act of 1996 requires interconnection agreements be filed for approval with the State Commission.--Missouri RSA No. 5 Partnership 13 MPSC 3d 488.

The Commission's Staff, under direction of its Executive Director, enjoys all necessary statutory authority to investigate and review any matter of concern touching upon the safe and responsible operation of a regulated utility. The Commission expects that Staff will promptly investigate any concerns it may have related to Cass County Telephone Company and New Florence Telephone Company.--Investigation of Cass County Telephone & New Florence Telephone 13 MPSC 3d 565.

III. OPERATIONS

§8. Operations generally

The Commission approved a stipulation and agreement between the Staff of the Commission, BPS Telephone Company and the Office of the Public Counsel whereby BPS would reduce its earnings by \$460,000.-PSC Staff v. BPS Telephone Company 13 MPSC 3d 447.

§9. Public corporations

The Commission found Missouri RSA No. 5 Partnership, d/b/a Chariton Valley Wireless and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri's Interconnection Agreement to be against public interest. The companies entered into a separate agreement for transit traffic, an interconnection service, which was not included in the Interconnection Agreement submitted to the Commission.--Missouri RSA No. 5 Partnership 13 MPSC 3d 488.

§10. Abandonment or discontinuance

The Commission opened this case in light of the MCI WorldCom, Inc., bankruptcy. The Commission did so, in part, to monitor the bankrupt

carriers' ability to serve their customers.--Investigation into Effects of Bankruptcy of Telcos 13 MPSC 3d 88.

§14. Rates

Based on the cost studies submitted by a telephone company, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.--Sprint 13 MPSC 3d 191.

The Commission approved a Stipulation and Agreement between AT&T Communications of the Southwest and the Staff of the Commission. AT&T erroneously billed customers a \$3.95 monthly recurring charge. The Commission closed the case after AT&T fixed the coding and systems processing errors that caused the monthly charge. In addition, AT&T provided 2,000 AT&T Prepaid Calling Cards to families of the Missouri National Guard reservists.--PSC Staff v. AT&T 13 MPSC 3d 213.

Following a remand from the Circuit Court of Cole County, the Commission adopted the findings of fact and conclusions of law from a related case – TR-2002-251 – as the basis for its decision to permit Sprint to reduce its access service charges, while increasing its basic local service rates, so that both rates would more closely reflect the actual cost of providing those services.--Sprint Missouri, Inc. 13 MPSC 3d 333.

Based on the cost studies submitted by Sprint Missouri, Inc. d/b/a Sprint, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.--Sprint Missouri, Inc. 13 MPSC 3d 341.

The Commission raised the Relay Missouri Program surcharge from \$.10 per month per access line to \$.13 per month.--Relay Missouri 13 MPSC 3d 512.

§14.1 Universal Service Fund

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC failed to provide the Commission with plans for the use of the federal universal service funds; MMC also failed to provide information detail-

ing how the public would benefit from designating MMC as an eligible telecommunications carrier.--Mid-Missouri Cellular 13 MPSC 3d 130.

The Commission ruled that telecommunication carriers shall pay assessments of 1.8 percent times the previous month's net jurisdictional revenue, to the Missouri Universal Service Fund administrator on the 22nd day of each month. The requests for reimbursements shall be made no later than the 15th day of each month and reimbursements shall be dispatched no later than the last day of each month. Affected carriers may recover their assessments through a surcharge. The provisions of 4 CSR 240-31.050(3)(D) are waived for Missouri customers who receive federal Lifeline support.--Investigation - Missouri Universal Service Fund 13 MPSC 3d 417.

§19. Financing practices

Staff believes that the proposed financing is reasonable although it will result in a significant change in Alma's consolidated capital structure. Alma's long-term financial integrity will not be threatened though.--Alma Communications Company 13 MPSC 3d 502.

§21. Construction

Alma plans to replace its existing loops and related plant with fiber in order to provide adequate bandwidth to access future voice, data, and video services. This new switch and fiber will be installed in 2005 and 2006.--Alma Communications Company 13 MPSC 3d 502.

§23. Rules and regulations

The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide basic local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.--ALLTEL Missouri, Inc. 13 MPSC 3d 2.

The Commission closed this case in light of a November 30, 2004 Commission rule that would require certificated carriers to provide bankruptcy information to the Commission.--Investigation into Effects of Bankruptcy of Telcos 13 MPSC 3d 88.

The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT

did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.--BPS Telephone 13 MPSC 3d 92.

§25. Additions and betterments

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC failed to provide the Commission with plans for the use of the federal universal service funds; MMC also failed to provide information detailing how the public would benefit from designating MMC as an eligible telecommunications carrier.--Mid-Missouri Cellular 13 MPSC 3d 130.

Alma seeks to borrow \$5,579,000 from the RUS Administration of the US Department of Agriculture in order to upgrade its network and purchase a new switch. This will fund capital improvements consisting of a new switch and fiber subscriber lines.--Alma Communications Company 13 MPSC 3d 502.

§26. Service generally

The Commission's November 30, 2004, Order Denying Rehearing and Granting Reconsideration amended the original Report and Order issued on August 5, 2004, and further denied Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (MMC) the eligible telecommunications carrier designation for federal universal service funds. MMC did not provide the Commission with specific plans of use of the universal service funds, therefore, the Commission could not determine if MMC would be providing additional services compared to the current plans provided.--Mid-Missouri Cellular 13 MPSC 3d 130.

§29. Local service

The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide basic local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.--ALLTEL Missouri, Inc. 13 MPSC 3d 2.

The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.--BPS Telephone 13 MPSC 3d 92.

SBC offers a transit service to wireless carriers. Wireless calls originated by customers of the CMRS providers are transported to local telephone company customers. SBC provides the transit service either according to its intrastate wireless interconnection tariff, or under an interconnection agreement with the originating CMRS carrier.--BPS Telephone Company, et al. v. Voicestream Wireless Corporation, Western Wireless Corp., and Southwestern Bell Telephone Company 13 MPSC 3d 244.

The local exchange telephone company is to retain one percent or \$30.00 whichever is greater, of the surcharge collected each month.--Relay Missouri 13 MPSC 3d 512.

§30. Calling scope

The Office of the Public Counsel filed a motion requesting that the Commission "provide for expanded local calling scopes in the rural areas of Missouri" and that the Commission instead establish a procedure for the creation of these plans. The Commission determined that this case could be closed because the Commission is in the process of implementing an administrative rule, in Case No. TX-2005-0194, that will address the concerns raised by the Office of the Public Counsel.--Investigation - Expanded Local Area Calling 13 MPSC 3d 411.

In response to the Final Report of the Metropolitan Calling Area Plan Task Force, the Commission opened a rulemaking case and published the proposed rule in the Missouri Register. In this Order, the Commission determined it was appropriate to close this case and continue with its rulemaking case and the five pending calling scope cases discussed in the Order.--Investigation - MCA/Calling Scopes 13 MPSC 3d 486.

§33. Billing practices

The Commission approved a Stipulation and Agreement between AT&T Communications of the Southwest and the Staff of the Commission. AT&T erroneously billed customers a \$3.95 monthly recurring charge. The Commission closed the case after AT&T fixed the coding and systems processing errors that caused the monthly charge. In addition, AT&T provided 2,000 AT&T Prepaid Calling Cards to families of the Missouri National Guard reservists.--PSC Staff v. AT&T 13 MPSC 3d 213.

The Commission established this uncontested case directing the Staff of the Commission to investigate all matters pertaining to the financial and operational reliability of Cass County Telephone Company and New Florence Telephone Company. The investigation stemmed from a Federal indictment alleging a shareholder and officer were involved in a telephone cramming scheme involving the companies. Staff was also directed to investigate the unauthorized charges on the customers bills and the receipt and disbursement of the Universal Service Funds.--Investigation of Cass County Telephone and New Florence Telephone 13 MPSC 3d 237.

SBC delivers transit traffic over its common trunk groups. None of the Complainants can distinguish that traffic from other interexchange traffic SBC sends over the same trunk groups. Thus they are unable to block such traffic, even when the originating CMRS carrier refuses to pay for termination. The Commission finds that SBC delivered wireless originated traffic from T-Mobile and Western Wireless's subscribers to subscribers of each of the Complainants during the time at issue. --BPS Telephone Company, et al. v. Voicestream Wireless Corporation, Western Wireless Corp., and Southwestern Bell Telephone Company 13 MPSC 3d 244.

The "cell phone" user that originated a call paid either T-Mobile or Western Wireless for the service. T-Mobile or Western Wireless then paid SBC, and any other carrier involved in transiting the call, but did not pay any of the Complainants. Although each of the Complainants has demanded payment, Respondents refuse to pay. --BPS Telephone Company, et al. v. Voicestream Wireless Corporation, Western Wireless Corp., and Southwestern Bell Telephone Company 13 MPSC 3d 244.

§34. Pricing policies

Citing the Missouri Court of Appeals, the Commission found that rural carriers "have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements."--BPS Telephone Company, et al. v. Voicestream Wireless Corporation, Western Wireless Corp., and Southwestern Bell Telephone Company 13 MPSC 3d 244.

The Commission approved a stipulation and agreement entered into between the Staff of the Commission, BPS Telephone Company and the Office of the Public Counsel whereby customers in Bernie, Parma and Steele, Missouri, will have expanded local one-way calling.--PSC Staff v. BPS Telephone Company 13 MPSC 3d 447.

IV. RELATIONS BETWEEN CONNECTING COMPANIES

§36. Relations between connecting companies generally

With jurisdiction and acts pursuant to 47 U.S.C. Sections 251 and 252, as well as Section 386.310, RSMo 2000, the Commission ordered SBC Missouri to continue accepting and processing new orders, moves, adds, and changes to the Coalition members' and intervenors' existing embedded customer base, under the rates, terms and conditions of their respective M2A or M2A-derived Agreements. SBC was also ordered to process requests for Unbundled Network Elements when the requesting carrier has self-certified. Further, the Commission ordered the companies to comply with the Federal Communications Commission's Triennial Review Remand Order until their Interconnection Agreements have been amended.--Southwestern Bell Telephone 13 MPSC 3d 413.

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between SBC Communications, Inc. and AT&T Corporation. The Commission issued an order closing case because they had no jurisdiction over transactions at the holding company level.--SBC Communications, Inc. 13 MPSC 3d 449.

The Commission approved an interconnection agreement that did not contain transiting traffic provisions, but ordered that when the parties reached such an agreement they must file it with the Commission for approval pursuant to Section 252(e) of the Telecommunications Act.--Level 3 Communications 13 MPSC 3d 461.

An interconnection agreement that does not contain transiting provisions is not necessarily discriminatory toward other carriers and the mere absence of transiting traffic provisions in the submitted agreement cannot justify the rejection of that agreement.--Level 3 Communications 13 MPSC 3d 461.

The Commission rejected the Office of the Public Counsel's request to conduct an investigation into the merger between Verizon Communications, Inc. and MCI, Inc. The Commission issued an order closing case because it had no jurisdiction over transactions at the holding company level.--Verizon Communications, Inc. 13 MPSC 3d 468.

An interconnection agreement is any agreement that has terms of interconnection. Transit service is a form of indirect interconnection. Therefore, if the parties have an agreement covering transit service, that agreement must be filed with the Commission for approval.--Chariton Valley Communications Corporation 13 MPSC 3d 494.

§38. Contracts

A contract that does not include all of the parties' interconnection terms is deficient. It is against the public interest for the Commission to approve only part of the parties' interconnection agreement. The whole agreement should be before the Commission and, if approved, other carriers may adopt that agreement.--Chariton Valley Communications Corporation 13 MPSC 3d 494.

V. ALTERNATIVE REGULATION AND COMPETITION**§45. Local exchange competition**

In determining the rates that an incumbent local exchange carrier could charge for the lease of certain unbundled network elements, the Commission determined that a capital structure containing 70 percent equity and 30 percent debt was appropriate for determining the weighted cost of capital for a hypothetical company exclusively in the business of selling unbundled network elements.--Southwestern Bell Telephone Company 13 MPSC 3d 201.

While the Commission may amend the terms of the model M2A agreement, it does not have authority to summarily amend the interconnection agreements between parties who have previously adopted the M2A.--Southwestern Bell Telephone Company 13 MPSC 3d 201.

While denying a motion for rehearing, the Commission clarified its previous report and order to indicate that the Commission had made no finding about which provisions of the interconnection agreements would apply to determine the means by which the rates resulting from the report and order may be incorporated into those agreements.--Southwestern Bell Telephone, L.P., 13 MPSC 3d 242.

§46. Interconnection agreements

The original Missouri 271 Interconnection Agreement (M2A) between Southwestern Bell Telephone L.P., d/b/a SBC Missouri and Missouri CLEC's in Missouri's interLATA long distance market was modeled after a Section 271 proceeding in Texas. The Texas Commission updated versions of the Business Rules following two six-month review periods. SBC Missouri did not agree with all the changes made by the Texas Commission. SBC Missouri's December 2002 revisions included the revisions SBC Missouri agreed with from both updated versions of the Business Rules.

In the Commission's order, the Commission determined that the changes the parties agreed upon shall be included in the M2A. The Commission also determined that the disputed issues do not provide any Missouri-related evidence to determine if the issues are in the pub-

lic interest and will not be included in the M2A.--SBC Missouri 13 MPSC 3d 170.

In determining the rates that an incumbent local exchange carrier could charge for the lease of certain unbundled network elements, the Commission determined that a capital structure containing 70 percent equity and 30 percent debt was appropriate for determining the weighted cost of capital for a hypothetical company exclusively in the business of selling unbundled network elements.--Southwestern Bell Telephone Company 13 MPSC 3d 201.

While the Commission may amend the terms of the model M2A agreement, it does not have authority to summarily amend the interconnection agreements between parties who have previously adopted the M2A.--Southwestern Bell Telephone Company 13 MPSC 3d 201.

While denying a motion for rehearing, the Commission clarified its previous report and order to indicate that the Commission had made no finding about which provisions of the interconnection agreements would apply to determine the means by which the rates resulting from the report and order may be incorporated into those agreements.--Southwestern Bell Telephone, L.P., 13 MPSC 3d 242.

With jurisdiction and acts pursuant to 47 U.S.C. Sections 251 and 252, as well as Section 386.310, RSMo 2000, the Commission ordered SBC Missouri to continue accepting and processing new orders, moves, adds, and changes to the Coalition members' and intervenors' existing embedded customer base, under the rates, terms and conditions of their respective M2A or M2A-derived Agreements. SBC was also ordered to process requests for Unbundled Network Elements when the requesting carrier has self-certified. Further, the Commission ordered the companies to comply with the Federal Communications Commission's Triennial Review Remand Order until their Interconnection Agreements have been amended.--Southwestern Bell Telephone 13 MPSC 3d 413.

The Commission approved and found the Interconnection Agreement between Southwestern Bell Telephone, L.P. and Sage Telecom, Inc., as well as the unanimous Stipulation and Agreement, which was not objected to, to both be in the public interest.--Southwestern Bell Telephone, L.P./Sage Telecom, Inc. 13 MPSC 3d 480.

§46.1. Interconnection Agreements-Arbitrated

The Commission agrees with SBC that many changes are necessary regarding the Final Arbitrator's Report. The Commission orders for the changes to be made and SBC's clarifying language to be adopted.--Southwestern Bell Telephone, L.P., 13 MPSC 3d 519.

§47. Price cap

The Commission found ALLTEL's election to become a price-cap regulated carrier invalid. Although Missouri State Discount Telephone and Universal Telecom, Inc. were granted certificates to provide local telecommunication service in ALLTEL's service area, these companies do not offer the "essential local telecommunication services" listed in 4 CSR 240.31.010(5), as required by their certificates. Thus, the Commission determined, Missouri State Discount Telephone and Universal Telecom were not providing basic local services in accordance with their certificates, thus, ALLTEL did not qualify as a price-cap carrier.--ALLTEL Missouri, Inc. 13 MPSC 3d 2.

The Commission found BPS Telephone Company's election to become a price cap regulated carrier invalid. Although MSDT was granted a certificate to provide basic local telecommunication service, MSDT did not offer all of the "essential local telecommunication service" as required by their certificate. Because MSDT was not providing basic local services, the Commission found BPS did not qualify as a price cap carrier.--BPS Telephone 13 MPSC 3d 92.

Based on the cost studies submitted by Sprint Missouri, Inc. d/b/a Sprint, and supported by a recommendation from its Staff, the Commission found that the company's costs for basic local service were sufficiently above the rates it was charging for that service to justify a rate rebalancing that would increase local service rates while decreasing access service rates.--Sprint Missouri, Inc. 13 MPSC 3d 341.

VALUATION**I. IN GENERAL**

- §1. Generally**
- §2. Constitutional limitations**
- §3. Necessity for**
- §4. Obligation of the utility**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of local authorities**

III. METHODS OR THEORIES OF VALUATION

- §9. Methods or theories generally**

- §10. Purpose of valuation as a factor
- §11. Rule, formula or judgment as a guide
- §12. Permanent and tentative valuation

IV. ASCERTAINMENT OF VALUE

- §13. Ascertainment of value generally
- §14. For rate making purposes
- §15. Purchase or sale price
- §16. For issuing securities

V. FACTORS AFFECTING VALUE OR COST

- §17. Factors affecting value or cost generally
- §18. Contributions from customers
- §19. Appreciation
- §20. Apportionment of investment or costs
- §21. Experimental or testing cost
- §22. Financing costs
- §23. Intercorporate relationships
- §24. Organization and promotion costs
- §25. Discounts on securities
- §26. Property not used or useful
- §27. Overheads in general
- §28. Direct labor
- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
- §32. Preliminary and design
- §33. Interest during construction
- §34. Insurance during construction
- §35. Taxes during construction
- §36. Contingencies and omissions
- §37. Contractor's profit and loss
- §38. Administrative expense
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- §42. Buildings and structures
- §43. Equipment and facilities
- §44. Land
- §45. Materials and supplies
- §46. Second-hand property
- §47. Property not used and useful

VII. VALUATION OF INTANGIBLE PROPERTY

- §48. Good will
- §49. Going value
- §50. Contracts
- §51. Equity of redemption
- §52. Franchises
- §53. Leases and leaseholds
- §54. Certificates and permits
- §55. Rights of way and easements
- §56. Water rights

VIII. WORKING CAPITAL

- §57. Working capital generally
- §58. Necessity of allowance
- §59. Factors affecting allowance
- §60. Billing and payment for service
- §61. Cash on hand
- §62. Customers' deposit
- §63. Expenses or revenues
- §64. Prepaid expenses
- §65. Materials and supplies
- §66. Amount to be allowed
- §67. Property not used or useful

IX. DEPRECIATION

- §68. Deprecation generally
- §69. Necessity of deduction for depreciation
- §70. Factors affecting propriety thereof
- §71. Methods of establishing rates or amounts
- §72. Property subject to depreciation
- §73. Deduction or addition of funds or reserve

X. VALUATION OF PARTICULAR UTILITIES

- §74. Electric and power
 - §75. Gas
 - §76. Heating
 - §77. Telecommunications
 - §78. Water
 - §79. Sewer
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VALUATION**IX. DEPRECIATION****§71. Methods of establishing rates or amounts**

The Commission's January 11, 2005, Third Report and Order maintains the current depreciation method as the approach to be used when calculating the net salvage value, as Staff provided no evidence to support that the recommended change in the accrual method of net salvage was more reasonable than the current depreciation method, which is consistent with the Uniform System of Accounts adopted by the Commission. The Commission further ordered Laclede to begin using separate accounts to accurately trace expenditures and collections to ensure the utility customers do not overpay net salvage costs.--Laclede Gas Company 13 MPSC 3d 215.

WATER**I. IN GENERAL**

- §1. Generally**
- §2. Certificate of convenience and necessity**
- §3. Obligation of the utility**
- §4. Transfer, lease and sale**
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- §6. Jurisdiction and powers generally**
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- §12. Operation generally**
- §13. Construction and equipment**
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- §19. Service**

- §20. Depreciation
- §21. Discrimination
- §22. Apportionment
- §23. Accounting
- §24. Valuation
- §25. Extensions
- §26. Abandonment or discontinuance
- §27. Reports, records and statements
- §28. Financing practices
- §29. Security issues
- §30. Rules and regulations
- §31. Billing practices
- §32. Accounting Authority orders

WATER

I. IN GENERAL

§4. Transfer, lease and sale

The Commission rejected, without a hearing, an application that would have conveyed all of a company's water assets, and some, but not all, of its sewer assets to another utility company, where the distressed selling company, which was already providing poor service to its customers, would have been left to operate a remnant portion of its sewer system.--Missouri-American Water Company 13 MPSC 3d 499.

III. OPERATIONS

§29. Security issues

The Commission allowed an AAO for deferring the costs of armed guards, increased water sampling, and computer security following the September 11, 2001 terrorist attacks in America. The Commission mentioned that it had acted similarly during World War II when it allowed rate increases to pay for security measures.--Missouri-American Water Company 13 MPSC 3d 103.
